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Trafficked Persons as Refugees

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TRAFFICKED PERSONS AS REFUGEES

Jean-Pierre Gauci

Thesis submitted in partial fulfilment of the requirements for the award of the Degree
of Doctor of Philosophy (Ph.D.) at the Dickson Poon School of Law, King's College
London

October 2013

Abstract

This research critically engages with the long-term protection of trafficked persons. In particular it assesses whether, and the conditions under which, trafficked persons can be considered as refugees under the Geneva Refugee Convention. The importance of international refugee law in this context is determined both by the number of trafficked persons seeking international protection and by its suitability to overcome the shortcomings of existing protection provisions in anti-trafficking instruments which remain discretionary, conditional and limited in scope.

Trafficked persons, as examples of modern victims of human rights abuse par excellence, are examples of who refugee law—with its humanitarian and human rights imperatives—should be protecting. This thesis demonstrates that while a liberal interpretation of the refugee definition has been attempted by lawyers and courts alike to cover trafficked persons, a significant number of trafficking-based claims could be made out even if a more restrictive interpretation is adopted. It builds on judicial decisions from a variety of jurisdictions to elaborate on the fundamental inter-sectionality of issues and instruments which should underpin any assessment of trafficking based asylum claims.

After a brief introduction to the content and structure of the thesis, Chapter 1 provides an overview of the definitions and legal context for the research, as well as outlines the methodological approach. Chapter 2 engages with the existing protection provisions under the anti-trafficking instruments, arguing that alone they are insufficient to adequately protect trafficked persons and that refugee law offers a viable alternative. Chapters 3 to 5 discuss the three main components of the refugee definition as applied to trafficked persons namely: well-founded fear (including [lack of] State Protection), persecution and the Convention ground nexus. Chapter 6 elaborates on the relevance of exclusion and cessation clauses to traffickers and trafficked persons who commit serious offences, whilst Chapter 7 examines some of the procedural issues in the context of determining such claims. The Conclusion highlights the main arguments identified throughout the thesis as briefly outlined above.

To my mum,

I couldn't have done it without you,

I love and miss you. Rest in Peace.

Acknowledgements

Thanks and much appreciation go to my supervisor, Satvinder Juss, Professor of Law at King's College London, for his unwavering support and help throughout the period of research. His expertise, guidance and advice were invaluable and will always be deeply appreciated. I feel honoured to have been given the opportunity to work under his tutelage. I would also like to extend my thanks to my second supervisor Prof. Maleiha Malik. Her insights at various stages of the research, and her support for the project itself are greatly appreciated.

Special thanks also to Olav Attard for proof reading this thesis and to Patricia Mallia and Carol Bohmer, for their academic support throughout the process.

This research would not have been possible without the constant support, guidance and encouragement of my parents, Saviour and Teresa Gauci. You made me who I am today, and I am eternally grateful. Special thanks also to my sisters, Claudia, Giannella, Daniela and Elena, my brothers-in-law, Ivan, Olav, Jonathan and Joseph and nephews and nieces, Domenico, Maria-Pia, Matthias, Juan, Nathan, Martha, Hannnah, Izaak, Rakel and Liam. I simply cannot thank you enough.

My academic journey has been supported by countless colleagues and friends with whom I've discussed the research, its findings, and the frustrations of the process itself. Many thanks to Andre, Christine, Diane, Egle, Ferya, and Katie, for being there throughout this journey. Your friendship is greatly appreciated.

And finally, to all those who believed in me, because you did.

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Table of Abbreviations

APOV	Abuse of a Position of Vulnerability
CEDAW	Convention on the Elimination of all forms of Discrimination against women
CoE	Council of Europe
CRC	Convention on the Rights of the Child
DEVAW	Declaration on the Elimination of Violence Against Women
DOS	Department of State
ECHR	European Convention on Human Rights
ECJ	European Court of Justice / Court of Justice of the European Union

ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
ERF	European Refugee Fund
EU	European Union
FRA	European Union Fundamental Rights Agency
GRETA	Council of Europe Group of Experts on Action against Trafficking in Human Beings.
IAT	Immigration Appeals Tribunal
ICERD	International Convention on the Elimination of Racial Discrimination
IJRL	International Journal of Refugee Law
NYPD	New York Police Department
OAS	Organisation of American States
OHCHR	Office of the High Commissioner for Human Rights
RRT	Refugee Review Tribunal (Australia)
SAARC	South Asian Association for Regional Cooperation
SVU	Special Victims Unit
THB	Trafficking in Human Beings
TIP	Trafficking in Persons
UK	United Kingdom
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime

USA	United States of America
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European law

Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national; Official Journal L 50/1, 25 February 2003 (Dublin Regulation)

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA; Official Journal L 101/1, 15 April 2011

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status

for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast); OJ L 337/9, 20 December 2011

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), Official Journal L 180/60, 29 June 2013

National Statutes

United States:

William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 [United States of America], Public Law 110–457, 23 December 2008 US Law

Malta

Criminal Code, Chapter 9 of the Laws of Malta

Norway

Act of 15 May 2008 on the Entry of Foreign Nationals into the Kingdom of Norway and their Stay in the Realm (Immigration Act)

Introduction

Most movies and novels around the issue of human trafficking conveniently ignore the experiences of the trafficked person, choosing instead to focus on the salacious aspects of sex and violence. Some outline the plight of trafficked persons providing a glimpse into the vulnerability to trafficking and what happens within the context of the brothel, sweatshop or farm. Most organisations working on these issues engage with awareness-raising initiatives that focus on the gross human rights violations inherent in this treatment. However, these movies and efforts tend to end around the time when ICE,¹ NYPD,² SVU,³ or others enter the venue and ‘rescue’⁴ the trafficked persons, or when the individual escapes and reaches a place of immediate safety. They ignore a critical part of the experience(s) of trafficked persons – the part where they have to face the prospect and risks associated with return, overcome the trauma associated with their past experiences, and deal with a legal, policy and institutional framework that is often not explained and largely sceptical of their claims.

On 19 April 2011, the British newspaper The Guardian reported the harrowing case of Katya, a Moldovan girl trafficked to the UK. Having escaped, she was not considered by UK immigration authorities to require protection. Deported to Moldova, she was tracked down by her former traffickers, beaten, threatened with death and forced to dig her own grave, tortured, raped and re-trafficked, first to

¹ Immigration and Customs Enforcement

² New York Police Department

³ Special Victims Unit, a specific department of the New York Police Department dealing with sexually based offences and crimes regarding children

⁴ The inverted commas aim to reflect an acknowledgement of the controversial nature of the use of this term in this context, despite the fact that a discussion thereof is beyond the scope of the present thesis

Israel and then back to the UK. Escaping one more time, she was eventually reluctantly recognised as a refugee, and offered a settlement by the UK government.⁵ Her story, and that of many others in similar situations, highlights the importance of long-term protection for trafficked persons.

This is the focus of the present research, that is, to assess the post-trafficking scenario and in particular the individual's search for long-term protection. This is addressed from the perspective of international refugee law. In particular it assesses whether, and the conditions under which, trafficked persons can be considered as refugees and some of the implications of such protection. It argues for an application of refugee law that will ensure that Katya's ordeal does not repeat itself and that the human rights of trafficked persons are protected in the immediate, medium and long term irrespective of and beyond their collaboration with the criminal justice processes. The relevance of this discussion further stems from the growing number of trafficked persons who have sought international protection. Unpublished research by the Poppy Project, building off the largest sample of its kind (n=230), highlights how 98% of non-EU trafficked persons applied for asylum.⁶

The argument of this research begins from the premise that trafficked persons are particularly apt for the grant of refugee status by virtue of their past experiences of serious and grave human rights violations and their risk of further harm upon return. Indeed, if refugee status does not offer protection for people in Katya's situation, how effective can refugee protection be considered in practice? Would it not go against any reasonable (good faith) interpretation of the Refugee Convention to

⁵ Amelia Gentleman, 'Katya's Story: Trafficked to the UK, Sent Home to Torture' *The Guardian* (London, United Kingdom, 19 April 2011) Online Edition

⁶ The Poppy Project, *No End in Sight: A Quantitative Analysis of the Experiences of Women Trafficked into the UK* (London Poppy Project 2012)

allow an individual, who has already suffered harrowing harm, to be returned to a risk of a repetition thereof?

This research contributes to the existing literature on this topic by exploring the arguments in greater depth, by adopting a comparative legal perspective of the issue and by extending the scope of the arguments previously advanced by academics in the field. The limited literature thus far has tended to focus primarily, if not exclusively, on a single jurisdiction, detailing how that particular country's legislation and case law applied the refugee definition to trafficked persons. In contrast, the present research adopts a comparative approach, relying on case law from countries with well established asylum systems and which have experience dealing with trafficking based claims namely; the UK, USA, France, Norway, Canada, Germany, Costa Rica, New Zealand and Ireland, taking the analysis of this issue a step further. Relying on principles and determinations from different courts, this research seeks to develop an argument that can be applied consistently upon the basis of the refugee definition, through the identification of legal principles that are defensible under international, regional and national law.

Moreover, existing research has also tended to focus on trafficking for the purpose of sexual exploitation. This research seeks to develop principles applicable to trafficking for all forms of exploitative purposes building on the European Court of Human Rights' determination that trafficking as defined in the Trafficking Protocol is tantamount to a violation of Article 4 of the European Convention,⁷ thereby recognising it as a human rights violation in and of itself.

⁷ See for instance; *Rantsev v. Cyprus and Russia*, Application no. 25965/04, Council of Europe: European Court of Human Rights, 7 January 2010

The research addresses asylum claims by four key categories of persons, directly related to the trafficking experience and whose asylum claims may be based on the trafficking process:

1. Trafficked Persons (also known as former victims of human trafficking),
2. Persons at risk of being trafficked,
3. Persons associated with trafficked persons (example: Family members),
4. Persons targeted due to their actions to combat trafficking.

In 2008, Piotrowicz argued that it was unrealistic to see refugee status as the solution to the dilemma of many trafficked persons, though conceding that in some cases it would have been possible.⁸ He asserts that trafficked persons do not 'fit easily into any of the categories recognized by the Convention as giving rise to an entitlement to refugee status.'⁹ This is further to his previous argument that subsidiary protection offers better chances of protection for trafficked persons.¹⁰ The present research posits, on the basis of available statistics and information, that his argument has been superseded by progressive judicial interpretation and that indeed trafficked persons are increasingly recognised as eligible for refugee protection. This notwithstanding, there still appears to be a reluctance by refugee status determination bodies to recognise trafficked persons as refugees. The research also argues that even if a more restrictive interpretation had to be taken, many trafficked persons will still be eligible for refugee protection. Moreover, in situations where claims for refugee status are not successful, a claim can, and

⁸ Ryszard Piotrowicz, 'The UNHCR's Guidelines on Human Trafficking' (2008) 20 *International Journal of Refugee Law* 242

⁹ Ibid, summarized in the abstract reflecting the general argument of the article

¹⁰ Ryszard Piotrowicz, 'Victims of People Trafficking and Entitlement to International Protection' (2008) 24 *Australian Yearbook of International Law* 159

indeed ought to be, considered for protection under other complementary forms of protection. An assessment of the eligibility of trafficking based claims under these forms of protection is however beyond the scope of the present research.

Trafficking-based asylum claims highlight the inter-sectionality of international legal instruments. It is virtually impossible to assess such a claim without recourse to instruments of refugee law, human rights law, transnational criminal law, as well as international humanitarian law. State Protection can only be adequately assessed against the background of the Protocol to the Convention on Transnational Organised Crime. This research therefore builds an analysis on the basis of a variety of legal instruments, identifying legal obligations emanating from the strict confines of human right law, but also from other areas including, for instance, the transnational criminal law framework.

This research presupposes a humanitarian conceptualisation of refugee law, as expounded by Courts across the globe in recent years. Such an approach builds on the broad humanitarian principles that underlie the Geneva Refugee Convention and the international legal regime of refugee protection. This research argues, however, that such humanitarian underpinnings do not undermine the political dimension of the granting of asylum. Granting refugee status to a trafficked person implies that the State of origin has proven unable or unwilling to fulfil its obligations towards its citizens, and thus remains a strong political statement. Moreover, the research also hypothesises that even if a restrictive interpretation of the refugee definition had to be applied, trafficked persons remain apt for recognition as refugees.

As Juss rightly argues, human trafficking stands poised to challenge refugee law, and we must ensure that refugee law is ready to meet that challenge.¹¹ This is in part the objective here: ensuring that refugee law is able and willing to take on the challenge of filling the gap left by counter-trafficking instruments in terms of protecting the human rights of trafficked persons. Trafficking-based asylum claims provide refugee lawyers with an opportunity to affirm the fundamental tenets of international protection on which their discipline is based, and with a context to map out the contours of protection that can be a useful model for similar future cases.¹²

Whilst the argument may sound objective and cool headed, its motives are not as dispassionate as that. Cases such as Katya's make remaining detached difficult. This research sets out to prove that trafficked persons do, in the most part, require protection beyond what is currently available, and that refugee law provides a channel for States to meet these needs. It seeks to do this, however, through robust legal argumentation that respects and promotes principles enshrined in international law. This research does not advocate for protection based on charity, but rather it argues that States are legally bound to provide protection under the general provisions of international and regional refugee law.

The first part of the research provides general remarks on the issues being discussed here. Chapter 1 provides a number of preliminary arguments. It also outlines the definitions that will be applied throughout the rest of this research. The chapter does not purport to develop its own definitions but rather to apply definitions enshrined in international legal instruments which are relevant to the present

¹¹ Satvinder Juss, 'Human Trafficking, Asylum and the Problem of Protection' in Satvinder Juss (ed), *The Ashgate Research Companion to Migration Law, Theory and Policy* (Ashgate 2012) 317

¹² Ibid 284

research. It then provides a mapping of the key provisions and instruments in the context of human trafficking and of refugee law, attempting to provide the context in which this research places itself. This mapping will span across international and regional anti-trafficking instruments, human rights law, transnational criminal law, international labour law, international and regional refugee law, and international humanitarian law. It is at this intersection of these instruments that an understanding of the legal nature of trafficking and asylum can be found. Finally, the chapter elaborates the methodology applied for this research including the reasons behind the methodological choices made and the nature and capacity of the research participants. This research applies a mixed socio-legal methodology. The primary focus is on desk research, including in particular case law analysis. The analysis is carried out in both a quantitative and qualitative manner allowing for trends to be identified and arguments to be made out. The desk research is supplemented by an element of qualitative research including conversations with key stakeholders and an element of case shadowing. It also presents the cases that will form the basis of the discussion throughout the rest of the research.

Chapter 2 starts by briefly describing the multiple points and levels of overlap between human trafficking and refugee law. These include overlapping causes and push factors, shared means of transport and overlapping criminal enterprises, the use of asylum as a means of legitimising the stay of trafficked persons, the opportunity of refugee status determination for the identification of and to raise awareness of trafficking with potentially trafficked persons, the vulnerability of refugees to trafficking and their involvement as perpetrators in some cases. Overlaps in the legal frameworks are also identified, not least the requirement in

anti-trafficking instruments that measures implemented within that context do not impinge on the rights of individuals to seek asylum. This chapter is intended to further highlight the relevance of the discussion on these overlaps and specifically the place of this research within that complex intersection.

The chapter then moves on to argue the justification for the research, building on one of the various points of intersection. It provides an in depth analysis of the protection potential of the anti-trafficking instruments from a human rights perspective, arguing that the dominance of law enforcement priorities within the context of the anti-trafficking instruments has resulted in weak protection for trafficked persons, especially outside and beyond collaboration. This argument is made on the basis of recent literature and the application of an assessment framework that develops that created by UNESCO in the context of the right to education. The chapter further argues the potential of asylum in this context, and the way in which refugee law overcomes some of the shortcomings highlighted about the protection provisions of the counter-trafficking instruments. This includes primarily the broadened scope of those eligible for protection, those responsible for granting protection, as well as the non-conditionality of that protection. The second, and main, part then deals with the substantive application of the refugee definition to trafficked persons.

Chapter 3 deals with the notion of well-founded fear as applied in trafficking-based asylum claims. It does so through the presentation of the findings of the case law analysis and the identification of critical factors assessed and determined by the relevant courts and tribunals. In particular it discusses the relevance of past trafficking (where relevant) and other experiences of persecution as creating a

rebuttable presumption of a well-founded fear and the specific individual characteristics that heighten vulnerability to trafficking. In particular the chapter draws correlations between trafficking levels and provisions, and other issues considered as key factors for trafficking including corruption, poverty and inequality. It then gives the examples of conflict and re-trafficking as situations of particular vulnerability whilst arguing, through the example of 'virginity', the need for a case-by-case determination.

The second part of the chapter addresses the notion of lack of State protection. This is relevant as a determining factor of well-founded fear, as a constitutive element of the definition of persecution, and with regard to the last limb of the Refugee Convention definition – that is the unwillingness or inability to go back to one's country of origin. This part starts with an elaboration of the conceptual relevance of State protection and the distinction between the accountability and protection approaches to refugee law. It then outlines the key State obligations in the context of trafficking as determined by the counter-trafficking instruments and the broader human rights framework. These include obligations to criminalise, investigate and punish trafficking, measures to prevent trafficking and address its causes, and measures to protect trafficked persons. Finally the chapter addresses the notion of agents of protection including the relevance of non-state actors in this context.

Chapter 4 delves into the notion of persecution and its meaning within the context of trafficking. In particular it discusses: modes of persecution, timing of persecution, agents of persecution, and locations of persecution. A core claim is that trafficking as defined in the Trafficking Protocol amounts to persecution. Risk of re-trafficking should therefore be assessed against this understanding. Trafficked persons might

also face other forms of persecution including, as was the case with Katya, retributory actions by former traffickers, as well as ostracism by their family and society. In some cases, the trauma associated with trafficking and/or the exclusion linked thereto amounts to continuing persecution, thereby meriting the grant of protection. Beyond arguing that trafficking qua trafficking amounts to persecution for the purposes of the Refugee Convention, the chapter presents the transnationality of persecution in trafficking-based claims as an example of how such claims might differ from standard refugee law claims. Finally, but possibly more importantly, the chapter argues that there is scope, under the purview of international law, and specifically the International Law Commission's Articles on State responsibility, to consider the State as the agent of persecution in a greater number of trafficking-based claims based on the attribution of the actions of officials of the State as well as the failure of due diligence.

Chapter 5 addresses the Convention ground nexus requirement. It does four main things. First it discusses the nexus requirement arguing that even if criminal profits and the self-preservation of the criminal enterprise are the primary intention and motivation for the trafficking, the impact of Convention grounds on the vulnerability of specific groups to trafficking and/or their selection as targets by traffickers is sufficient to meet the nexus requirement. Moreover, the nexus requirement is met either through the persecutory act itself and/or through the failure of the State to provide adequate protection.

Second, the chapter elaborates how trafficked persons and persons at risk of being trafficked have been placed within the context of particular social group. It does so through a principled analysis and through an analytical assessment of the relevant

case law. It argues that with regard to trafficked persons, their past experience of trafficking amounts to an immutable characteristic by virtue of its historical permanence (thereby meeting the immutable characteristic test). At the same time efforts to prevent and combat human trafficking and to protect trafficked persons reflect the view that trafficked persons are perceived as a group (thus meeting the social perception test). This is an issue to which extensive academic attention has been paid and whilst it is addressed in some depth here, the primary focus of this discussion is on moving forward from the inconsistency that has generally plagued this area of interpretation.

This is primarily attempted through the third part of the chapter which presents and assesses the Norwegian approach to the issue which explicitly provides, in the black letter of the law, that 'former victims of human trafficking' are regarded as members of a particular social group. It outlines some of the opportunities of this approach, like its inclusive terminology (covering trafficking for the various exploitative purposes both of men as well as women and children) as well as its challenges (like the exclusion of persons at risk of being trafficked). Overall this model presents a promising practice that could potentially assist trafficked persons in their search for protection.

Finally the chapter argues the relevance of other Convention grounds in the context of trafficking-based asylum claims, highlighting that in many cases such claims could be more strongly made out. Specifically it focuses on the ground of race, arguing that discrimination experienced by ethnic and racial minorities, coupled with specific targeting of specific groups due to demand or explicit vulnerability, and coupled

with discrimination in terms of access to State protection, makes race a particularly relevant ground for some trafficking-based claims.

Having argued that trafficked persons may be considered as refugees, Chapter 6 moves on to discuss situations in which trafficking might be considered as giving rise to exclusion from, or revocation of, refugee status. Part 1 discusses whether trafficking qua trafficking, as well as specific manifestations within trafficking, fulfills any of the requirements set out in Article 1(F) of the Refugee Convention. In particular it looks into the mentioning of trafficking within the description of enslavement in Article 7 of the Rome Statute of the International Criminal Court, emphasising the requirement that the particular act of trafficking fulfills all of the requirements of enslavement, and that of crimes against humanity more broadly, in order for the exclusion provision to be applied. Part 2 addresses trafficking as a serious non-political crime that can also lead to exclusion from, or revocation of, refugee status. This is based on the serious nature of the crime of trafficking as reflected by the international attention given to it and the types of harm it inflicts on trafficked persons. Part 3 assesses the issue of exclusion of persons who have been trafficked specifically with regard to acts committed whilst under the influence of their traffickers. Drug trafficking, for instance, is considered to be a serious offence, giving rise to the possibility of exclusion from refugee status. However trafficking for the purpose of exploitation through criminal activity is now a recognised trend in trafficking and this chapter therefore assesses that interplay. In particular it argues that denial of refugee protection is tantamount to punishment in its effect, and is therefore limited by the non-penalisation provisions within the various counter-trafficking instruments. Moreover the proper application of the non-criminalisation

provision would remove the basis for the application of the exclusion and revocation altogether.

Finally Chapter 7 addresses some of the more procedural issues and dimensions of the research question. Whilst the substantive argument may well be made out, it will be of little benefit to a trafficked person who does not gain access to the procedure because of either legal or practical barriers. The chapter starts with an overview of referral mechanisms between the processes of identifying trafficked persons and those for refugee status determination. It then addresses some aspects of competence of the asylum adjudication bodies, including the specific requirements, knowledge and sensitivity of courts and lawyers. The educational role of the lawyer in this context is particularly highlighted. Moreover, the chapter also addresses evidentiary issues. It assesses the way trafficking related issues are addressed in country guidance notes and country of origin information packages as well as the weaknesses of some of the more popular sources quoted by the courts, most notably the United States Trafficking in Persons Report. The conclusion revisits these key arguments in bringing together the key points highlighting some of the common themes that emerge from the research.

Chapter 1: Definitions, Legal Mapping and Methodology

Before delving into the substantive discussion of this thesis, it is prudent to present the terminology to be used throughout the thesis, the methodology adopted, as well as the legal and policy framework pertinent to the determination of trafficking-based asylum claims. This chapter is organised as follows: Part 1 provides a cursory snapshot of the phenomenon of human trafficking-based on available statistics.¹ Part 2 sketches some of the definitions used throughout the thesis based on contemporary definitions under international law. Part 3 maps the legal context in which trafficking-based asylum claims are considered. It covers both hard and soft law instruments from a variety of legal fields that have a direct bearing of the determination of such claims. Part 4 describes the methodology of this research including some of the methodological challenges experienced and how these were overcome.

Part 1: Human Trafficking – An Overview

Human trafficking is now a regular feature in the news and policy agendas around the world. It is 'one of the most demanding social issues of our time'² and is 'a crime of the 21st Century: adaptive, cynical, sophisticated, existing in developed and

¹ This section is not intended to be a comprehensive overview of human trafficking and is merely intended to provide some context for the remainder of the discussion in this thesis

² Satvinder Juss, 'Human Trafficking, Asylum and the Problem of Protection' in Satvinder Juss (ed), *The Ashgate Research Companion to Migration Law, Theory and Policy* (Ashgate 2012) 317

developing countries alike.³ Unfortunately efforts to understand and combat the crime are hindered by what has been aptly described as ‘a knowledge crisis’.⁴ Lack of information about trafficking has all too often resulted in inadequate and disjointed efforts that have proven ineffective.

1.1.1 Human Trafficking in Figures

Estimates as to the number of trafficked persons globally are speculative at best. The nature of the crime, coupled with the reluctance of all involved to bring cases to the attention of the authorities, make it virtually impossible to determine the exact number of persons trafficked every year or who are in a trafficking-based exploitative situation at any given time. Attempts in this regard have been undertaken. Different entities collecting data often use different definitions, making comparisons between data sets problematic. The International Labour Organisation (hereinafter ILO) provides estimates of forced labour in general (including therefore trafficking for labour and sexual exploitation) based on elaborate methodologies aimed at capturing the real picture of forced labour globally. The European Union (hereinafter EU) statistics provide the figures of people identified as actual or presumed trafficked persons. The United Nations Office on Drugs and Crime (hereinafter UNODC) figures rely on officially reported information from State Parties.

The ILO estimates that approximately ‘20.9 million people, that is, around three out of every 1,000 persons worldwide’, were in forced labour at any given point in time

³ Yury Fedotov, *Statement at the UN General Assembly High Level Meeting on Improving the Coordination of Efforts Against Trafficking in Persons* (United Nations 2013)

⁴ Costa Antonio Maria, ‘A Knowledge Crisis about a Crime that Shames us all’ in UNODC (ed), *Global Report On Trafficking In Persons* (United Nations Office on Drugs and Crime 2009)

between 2002 and 2011.⁵ As illustrated in Figure 1 below 90% of these are exploited in the private economy (22% in forced sexual exploitation, and 68% in forced labour exploitation) and 10% are in situations of state-imposed forms of forced labour.⁶

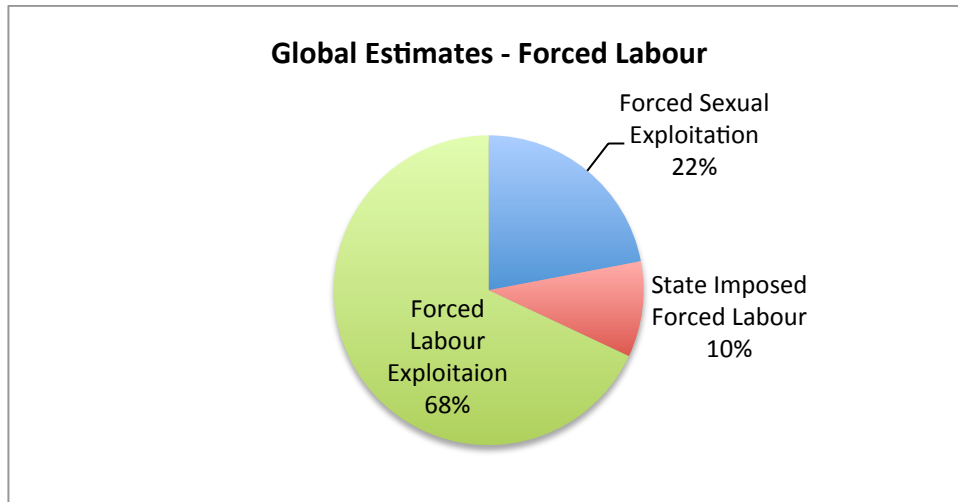


Figure 1: Global estimate by form of Forced Labour by Type of Exploitation Source: ILO

These statistics are said to ‘capture the full realm of human trafficking for labour and sexual exploitation’⁷ but, for reasons of competence do not cover trafficking for the purpose of: forced marriage, unlawful adoption or for the removal of organs. Conversely, the ILO remit and the concept of forced labour could in theory encapsulate forms of exploitation not considered to be trafficking, that is where the other requirements of the trafficking definition are not met. This figure for forced labour is believed to be a conservative (but not a minimum) estimate based on a strict methodology with a 68% level of confidence. UNODC notes that ‘while it is not known how many of these victims were trafficked, the estimate implies that

⁵ Special Action Programme to Combat Forced Labour, *ILO Global Estimate of Forced Labour: Results and Methodology* (International Labour Office ed, 2012) 13

⁶ This is described as including: labour in prison under conditions which violate ILO standards, or in work imposed by state military or rebel armed forces

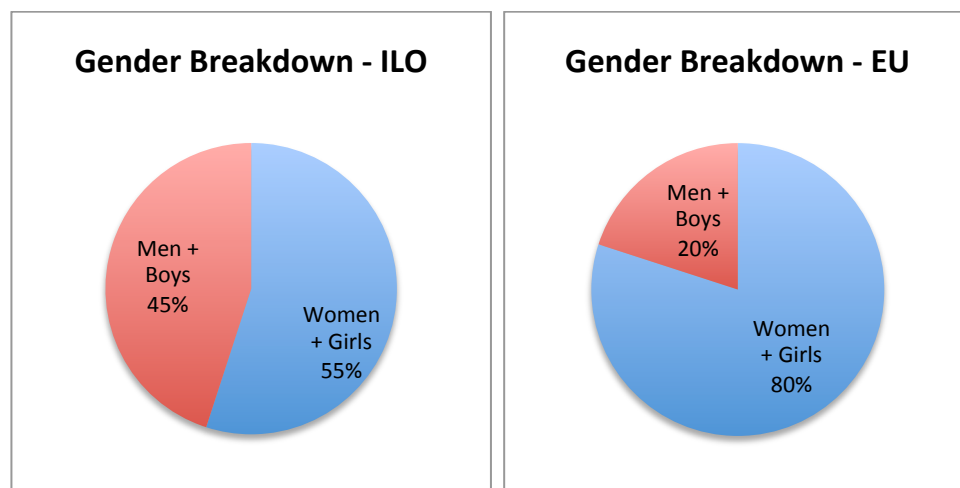
⁷ Special Action Programme to Combat Forced Labour (n 5) 13

currently, there are millions of trafficking in persons victims in the world'.⁸ UNODC's own analysis is based on a dataset of around 55,000 trafficked persons.⁹

In 2013, the European Union Statistics Office, EUROSTAT, published a statistical snapshot of human trafficking in Europe reporting on the period between 2008 and 2010.¹⁰ It notes that in 2010 Member States recorded 9,528 persons identified or presumed to be trafficked.

1.2 Trafficking – A Gendered Phenomenon

Gender breakdowns are provided by different international entities. The European Union reports that 68% of those identified or presumed to be trafficked were women and 12% were girls, whilst men made up 17% and boys 3%.¹¹ The UNODC notes that women account for 55-60% of all trafficked persons detected globally, whilst women and girls together make up about 75%. 27% of all trafficked persons are minors of whom about two thirds are girls and one third are boys.¹²



⁸ UNODC, *Global Report on Trafficking in Persons 2012* (United Nations Office on Drugs and Crime 2012) 1

⁹ Ibid 19

¹⁰ European Commission - DG Justice and Home Affairs & Eurostat, *Trafficking in Human Beings* (European Commission 2013)

¹¹ Ibid 10

¹² UNODC, *Global Report on Trafficking in Persons* (n 8)

Figure 2: Gender Breakdown by ILO
Source: ILO Global Estimates

Figure 3: Gender Breakdown by EU
Source: EUROSTAT

The ILO estimates place women and girls at 55% of trafficked persons and men and boys at 45%. They however then illustrate the gender divide by type of forced labour making a number of interesting observations. For instance, 98% of those in sexual exploitation in the private economy were women, whilst 60% of those in labour exploitation in the private economy were men, whilst 60% of those in labour exploitation were men.



Figure 4: Gender Breakdown by Type of Exploitation. Source: ILO Global Estimates

The gender breakdown is relevant to trafficking-based asylum claims. Human trafficking has, for a long time, been considered a gendered phenomenon affecting women and girls and in some cases boys. This gendered view is prejudicial to the identification of trafficked men and fails to fully address the spectrum of abuse that is human trafficking. This gendered view of trafficking has permeated into various aspects of counter-trafficking policy not least at the intersection with refugee law. It

is also reflected in much of the literature written about the issue which has often focused on women trafficked for sexual exploitation.

Human trafficking generates considerable profits for organised crime and traffickers generally. Methodologically sound research by Patrick Belser of the International Labour Organisation found that: 'the profits of forced labour could amount to 44.3 billion US dollars per year, of which 31.6 billion are made by exploiting trafficked victims'.¹³ This, it is often posited, makes it the third most profitable international crime after drug trafficking and counterfeiting. Whilst estimates remain tentative, and more research and analysis is needed in order to fully understand the economics of the crime, these estimates provide a clear indication of the financial incentive behind trafficking, as well as the complexity of dealing with anti-trafficking including the likelihood of corruption. This financial motivation has at times been considered negatively by refugee status determination processes whilst, conversely, it should also inform assessments of State protection.

1.2.1 New Forms of Trafficking

Greater efforts and resources are now being invested in researching and understanding less well known forms of trafficking and exploitation, including trafficking for forced begging, criminal activities and the removal of organs. The European Union, for instance, has made such research one of its funding priorities under the Prevention of and Fight against Crime Fund.¹⁴ It is critically important that all entities responsible for anti-trafficking and for protection claims by trafficked persons to be aware of these new trends and the specific protection needs associated

¹³ Patrick Belser, *Forced Labour and Human Trafficking: Estimating the Profits* (2005) 17

¹⁴ See: European Commission, *ISEC 2013 Targeted Call for Proposals* (European Commission 2013)

therewith. This is a procedural issue to which we return in Chapter 7. It is positive to note that the level of global awareness and apparent political will to combat the crime is on the increase. Indeed,

After much neglect and indifference, the world is waking up to the reality of a modern form of slavery. The public and the media are becoming aware that humans prey upon humans for money. Parliaments are passing appropriately severe laws. The judiciary is facing its anti-slavery responsibility with more prosecutions and convictions. Civil society and (to a lesser extent) the private sector are mobilising good-will and resources to assist victims'.¹⁵

Part 2: Definitions

2.1 Human Trafficking

Human trafficking is a poorly understood issue, despite being broadly discussed.¹⁶

Defining it remains a contentious issue, underpinned by legal, political and philosophical differences.¹⁷ Historically, the term trafficking referred to the compelled movement of women and girls for the purpose of prostitution.¹⁸ This was the case for the first phase anti-trafficking instruments that included the 1904, 1910, 1921, 1933 and 1949 Conventions and Agreements.¹⁹ Whilst none of these formalised a definition of trafficking, they focused on the movement of women and girls for exploitation through prostitution with the initial instruments focusing exclusively on 'white slaves'. None referred to the trafficking of men and boys or to trafficking for purposes other than prostitution. This research adopts the contemporary definition

¹⁵ Maria (n. 4) 1

¹⁶ See in this regard: Susan Kneebone, 'Protecting Trafficked Persons from Refoulement: Re-examining the Nexus' in Satvinder Juss and Colin Harvey (eds), *Contemporary Issues in Refugee Law* (Elgar 2013)

¹⁷ These differences have tended to revolve primarily around the issue of sex work, its legalisation and whether or not it is inherently exploitative

¹⁸ A detailed historical analysis of the definition is beyond the scope of the present research. For a discussion of this development see: Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) and Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a More Holistic Approach* (Martinus Nijhoff Publishers 2006)

¹⁹ For more detail see: Legal Mapping Section, below

of trafficking as adopted by the Trafficking Protocol²⁰ and replicated in the European regional instruments and the national legislation of many of the States Parties thereto. Considering the aim of the thesis, adopting a different definition of trafficking will be prejudicial to the relevance of the arguments made. Whilst acknowledging some of its limitations, including the difficulties inherent in meeting the three-pronged requirements, the definition provides an important milestone in conceptualising the issues at stake. Agreement on it is one of the greatest achievements of the Vienna Process that led to the adoption of the Protocol.²¹ The definition 'provides a general guidance to different actors, such as scholars, governments, non-governmental organisations and Inter-Governmental Organisations to examine and respond to trafficking'²² whilst it 'has done much to aid the collection of data on trafficking scope, patterns and trends'.²³

Article 3A of the Trafficking Protocol and Article 4 of the Council of Europe Convention on Action Against Trafficking in Human Beings²⁴ provide that the term human trafficking refers to:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

²⁰ Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime (Palermo, 15 November 2000, entered in force 29 September 2003), 40 ILM 335 (Trafficking Protocol)

²¹ References to the Vienna Process refer to the process of negotiations around the Convention on Transnational Organised Crime and its Protocols during which the Trafficking Protocol was drafted and, at the end of which, it was adopted

²² Obokata (n 18) 3

²³ Benjamin S. Buckland, 'Human Trafficking & Smuggling: Crossover & Overlap' in Cornelius Friesendorf (ed), *Strategies Against Human Trafficking: The Role of the Security Sector* (National Defence Academy and Austrian Ministry of Defence and Sports 2009) 137

²⁴ Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16 May 2005, entered into force 1 February 2008), CETS No 197

This definition, elucidated within a criminal law paradigm,²⁵ creates three constituent elements of the crime of trafficking, namely an act, the means and a purpose. All three must be present for the crime to subsist, as ‘the obligation is to criminalise trafficking as a combination of constituent elements and not the elements themselves’.²⁶ Actual exploitation is not required. As Obokata rightly notes what is required is merely the *mens rea* (the intention to exploit) and not the *actus reus* of actual exploitation.²⁷ The explanatory report to the CoE Convention also clarifies that ‘trafficking in human beings is consequently present before the victim’s actual exploitation’.²⁸ Under this definition, trafficking is an on-going exploitative process.

This definition marks an important development from previous instruments in expanding the scope of exploitation beyond the sex industry. Through its inclusive terminology, it both expands the scope to incorporate labour and organ removal exploitation, and remains open to the inclusion of other forms of exploitation in particular through the explicit statement that the listed exploitative means are a minimum and non-exhaustive list. This has proven useful in dealing with shifting trends in trafficking. For instance, neither forced begging, nor the exploitation of the criminal activities of others, were immediately apparent as trends at the time the Protocol was adopted, but have become increasingly widespread in the last decade. Whilst not included in the definition they have been subsumed within the listed

²⁵ Reflected by the fact that the UNODC was hosting the conference during which the Protocol was negotiated. See generally: Jean Allain, ‘Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery’ (2010) 10 *Human Rights Law Review* 546; Anne Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’ (2001) 23 *Human Rights Quarterly* 975; Gallagher, *The International Law of Human Trafficking* (n 18)

²⁶ United Nations Office on Drugs and Crime. Division for Treaty Affairs, *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto* (United Nations Publications 2004)

²⁷ Obokata (n 18) 20

²⁸ Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings* (2005) para 87

manifestations of exploitation and have since been incorporated in the 2011 EU Directive²⁹ and the national legislation of a number of countries. It is to be noted however that the South Asian Association for Regional Cooperation (hereinafter SAARC) Convention³⁰ reverts back to the understanding of trafficking prevalent before the adoption of the Protocol referring to the trafficking of women for the purposes of prostitution. The definition does not require any specific means, and does not explicitly refer to exploitation. Instead, it defines trafficking simply as:

The moving, selling or buying of women and children for prostitution within and outside a country for monetary or other consideration with or without the consent of the person subjected to trafficking.³¹

Table 1 below provides a snapshot of the means of exploitation explicitly listed in the various regional and sub-regional instruments. It highlights the limited scope of the SAARC Convention, the influence of the Protocol and the development of the definition under the 2011 EU Directive.

Exploitation			
Protocol	COE Convention	SAARC Convention	EU Directive
Exploitation of the Prostitution of Others	Exploitation of the Prostitution of Others	Prostitution	Exploitation of the Prostitution of Others
Other forms of sexual exploitation	Other forms of sexual exploitation		Other forms of sexual exploitation
Forced Labour or services	Forced Labour or services		Forced Labour or services

²⁹ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA; Official Journal L 101/1, 15 April 2011

³⁰ SAARC, Convention on Preventing and Combatting Trafficking in Women and Children for Prostitution, 5 January 2002

³¹ Article 1(3)

Slavery or practices similar to slavery	Slavery or practices similar to slavery		Slavery or practices similar to slavery
Servitude	Servitude		Servitude
Removal of Organs	Removal of Organs		Removal of organs
			Forced Begging
			Exploitation of Criminal Activities

Table 1: Exploitative Purposes under International and Regional Anti-Trafficking Instruments

Under the provisions of the ILO Forced Labour Convention (1930), forced or compulsory labour is defined as: ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’.³² This too therefore is a three pronged definition requiring: the provision of some form of work or service by the individual to a third party, the provision of the same under threat of a penalty and that the work is undertaken involuntarily. Penalty in this context, and more broadly in understanding the trafficking definition, may take a variety of guises including: physical, psychological, financial or other. The involuntariness requirement means that the person has either been recruited against their will or, having voluntarily taken on the job, finds that he or she cannot leave the job with reasonable conditions. In the words of the ILO ‘forced labour is thus not defined by the nature of the work being performed (which

³² International Labour Organization, Forced Labour Convention, C29 (28 June 1930) Article 2.1

can be legal or illegal under national law) but rather by the nature of the relationship between the person performing the work and the person exacting the work'.³³

Coercion, in the context of trafficking, and forced labour can take a variety of forms. In some cases it can be blatant and obvious including having armed guards preventing people from leaving the premises, or the confinement into locked premises. However in the most part they will include threats of harm to oneself and family, confiscation of identity documents, threats of denunciation to the authorities or one's work in the sex industry to one's family and community. Whilst trafficking movies often show heightened levels of violence, such 'visible' markers are not always inflicted, in part as a means of avoiding detection. The use of psychological threats also makes it more difficult for individuals to report cases of trafficking, to contribute to the prosecution of offenders or to seek and receive required protection.

Exploitation

Whilst set as the cornerstone of the definition of trafficking, the term exploitation is not defined anywhere in the anti-trafficking instruments or within the broader human rights framework. Whilst the instruments provide examples of what such exploitation might look like, they do not provide a definition. An English language dictionary defines exploitation as 'the action or fact of treating someone unfairly in order to benefit from their work' notably using the example of migrant workers as the example.³⁴

³³ Special Action Programme to Combat Forced Labour (n 5) 19

³⁴ See: <http://oxforddictionaries.com/definition/english/exploitation> [Last accessed: 5 October 2013]

Consent

A theme often raised around trafficking is the question of consent, largely replicating the debates in the feminist movement about the possibility or otherwise of consenting to prostitution. Acknowledging broader debates on this, legally speaking, ‘consensual trafficking of either adults or children is a legal impossibility’.³⁵ The debate is rendered mute by Article 3(b) of the Protocol, which unequivocally establishes that:

The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.³⁶

Similar provisions are also found in the regional and sub-regional instruments including Article 4 (b) of the CoE Convention, Article 2(4) of the 2011 Directive and article 1(3) of the SAARC Convention.

Broadly the definition has been well received. Whilst some commentators, including James Hathaway, have expressed concern about some of its limitations, including the need for the means element and the failure to oblige States to address other forms of slavery,³⁷ others like Gallagher have welcomed its generous parameters noting that ‘it is difficult to identify a “contemporary form of slavery” that would not fall within its generous parameters’.³⁸

Vulnerability

³⁵ Gallagher, *The International Law of Human Trafficking* (n 18) 47

³⁶ Article 3(b)

³⁷ See: James C Hathaway, ‘The Human Rights Quagmire of Human Trafficking’ (2008) 49 *Virginia Journal of International Law* 1

³⁸ Anne Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway’ (2009) 49 *Virginia Journal of International Law* 789, 814

The notion of vulnerability lies at the heart of legal discourse around human trafficking. Chapter 4, dealing with the notion of well-founded fear, will elaborate some of the vulnerability factors. In the context of trafficking vulnerability refers to two distinct concepts. The first is vulnerability as susceptibility to trafficking and the second is abuse of vulnerability as a means of trafficking. The former refers to ‘those inherent, environmental or contextual factors that increase the susceptibility of an individual or group to being trafficked’.³⁹ This will include, *inter alia*, poverty, discrimination and gender based violence. Vulnerability is about status and power in society and therefore minority groups, already in a weak societal position, will be more likely to be susceptible to trafficking. This is relevant when considering the Convention ground nexus requirement of the refugee definition to which we return in Chapter 5. The latter, that is the notion of ‘abuse of a position of vulnerability’ has not received the same attention as a means of trafficking as deception and coercion. However it is indeed an important one that underlies the recruitment of many into exploitative situations. Even if abuse of a position of vulnerability is now well accepted as an integral part of the trafficking definition, the intentions of the drafters of the Protocol in this respect remain unclear. No international legal definition exists and indeed unofficial guidance produced by entities, including the UNODC and ILO, are of limited use.⁴⁰ The *travaux préparatoires* indicate that ‘the reference to the abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.’⁴¹ The UNODC Guidance note provides that:

³⁹ Anne Gallagher, *Issue Paper: Abuse of a Position of Vulnerability and Other Means: Within the Definition of Trafficking in Persons* (United Nations Office on Drugs and Crime 2013)

⁴⁰ Ibid

⁴¹ Ibid 6

abuse of a position of vulnerability occurs when an individual's personal, situational or circumstantial vulnerability is intentionally used, or otherwise taken advantage of, for the purpose of exploiting him or her, such that the person believes that submitting to the will of the abuser is the only real or acceptable option available to him or her, and that belief is reasonable in light of the victim's situations.⁴²

Human trafficking is sometimes confused, or conflated, with other issues, including sex work, migrant sex work and migrant smuggling. It is pertinent to define these terms to clarify the contours of the present research.

Sex Work/Prostitution

The term sex work (or prostitution) refers to 'the act of providing sexual services in exchange for money, goods or favours'. Whilst this research does not address issues of sex work and protection needs arising from 'voluntary' sex work, the term is used throughout the thesis in referring to sexual exploitation, and with regard to protection challenges linked to one's status as a current or former status as sex worker (irrespective of the voluntariness of the status). This research will not engage in the debate on the possibility of otherwise of voluntary sex work. It is however noted that in some situations, such as ostracism and discrimination by the family and/or community the 'voluntariness' of the work might not be a determining factor.

Migrant Smuggling

As will be seen in Chapter 2, there are considerable overlaps between trafficking and smuggling that make the legal distinctions difficult to apply in practice. Under the Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the

⁴² UNODC, *Guidance Note on 'Abuse of a Position of Vulnerability' as a Means of Trafficking in Persons in Article 3 of the Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* (United Nations 2012) para 2.5

United Nations Convention against Transnational Organised Crime, the term is defined as:

The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.⁴³

The term illegal is further defined as referring to:

Crossing borders without complying with the necessary requirements for legal entry into the receiving State⁴⁴

In brief it refers to providing for undocumented border crossings intended to earn some form of benefit.⁴⁵ It is pertinent to briefly distinguish between trafficking and smuggling, not least because of the different standards of protection to which each refer. Three points of difference relate to: consent, trans-nationality and exploitation. Consent is deemed to be present and valid in the context of smuggling, whilst absent or vitiated in the context of trafficking. Trafficking can be either domestic or international, whilst smuggling is, by definition, trans-national. The relationship between smuggler and smuggled person is akin to a commercial transaction which comes to an end when the service is rendered and the (often exorbitant) fee paid. In trafficking, on the other hand, the main purpose (which is also a definitional constitutive element) is exploitation over a longer period of time. Traditionally trafficking was perceived as a human rights issue and a crime against the person, whilst smuggling was seen as a migration control issue (devoid of human rights

⁴³ Article 3

⁴⁴ Ibid

⁴⁵ This mention of a 'benefit' was apparently included in order to avoid the prosecution and punishment of persons assisting the crossing of borders for humanitarian or charitable reasons

concerns) and a crime against the State.⁴⁶ We return to the overlaps between human trafficking and migrant smuggling in Chapter 2.

Slavery

Article 1 of the 1926 Slavery Convention defines slavery as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’. Whilst an exploration of the legal and academic merits of the conflation of trafficking and slavery is beyond the scope of the present thesis, one notes that the ambiguous and undefined terms of the Slavery Convention definition have provided activists and scholars the space to interpret the definition expansively.⁴⁷ The relevance of slavery in understanding and addressing human trafficking is explored in this thesis, most notably in Chapter 4 (discussing trafficking as persecution) and Chapter and in reference to the ECHR’s determination in *Rantsev v. Russia and Cyprus*.⁴⁸

2.2 Refugee

Detailed definitions of the formal components of the refugee definition are provided in the relevant chapters of this thesis. For current purposes it is sufficient to briefly outline the general definitions applied in order to frame the remainder of the discussion. This research relies on the Geneva Refugee Convention⁴⁹ definition of refugee, that is a person who:

⁴⁶ For an assessment of the Smuggling Protocol and a discussion on its various perspectives, as well as its human rights implications see: Patricia Mallia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security Through the Creation of a Cooperative Framework*, vol 66 (Brill 2010). See also: Gallagher, ‘Human Rights and the New UN Protocols’ (n 23) and Buckland (n 22)

⁴⁷ See in this regard: Gallagher, *The International Law of Human Trafficking* (n 18)179

⁴⁸ *Rantsev v. Cyprus and Russia*, Application no. 25965/04, Council of Europe: European Court of Human Rights, 7 January 2010

⁴⁹ Convention Relating to the Status of Refugees (Geneva, 28 July 1951, entered into force 22 April 1954), 189 UNTS 137 (Geneva Refugee Convention)

Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside of the country of his nationality and is unable, or, owing to such fear, is unwilling to avail himself of the protection of that country.⁵⁰

This definition, developed in the aftermath of the Second World War, was primarily aimed at the situation of those fleeing Nazi persecution. Over the years, much judicial and academic energy has gone into its analysis and attempts to set its contours, balancing 'a legal space characterised, on the one hand, by the principle of State sovereignty (...) and, on the other, by competing humanitarian principles deriving from general international law and from treaty'.⁵¹ Trafficking-based asylum claims are an example of an area in which particular applicants benefit from a progressive interpretation of the Convention.

Since the adoption of the Geneva Convention a number of regional groupings have developed their own refugee law instruments and including expanded definitions of the term refugee. These instruments all adopt the Geneva Convention definition verbatim before moving on to expand it further, except for the Bangkok Principles, adopted at the AALCO's 40th Session in 2001, which added Gender as one of the Convention grounds. The African Convention on the situation of refugees in Africa, adopted by the Organisation for African Unity in 1969, as well as the Bangkok Principles, extend the definition to:

Any person compelled to leave his/her country owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or in the whole of his country of origin or nationality.⁵²

⁵⁰ Article 1A(2)

⁵¹ Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press 2007) 1

⁵² Article I (2)

The Cartagena Declaration, defines the term refugee as including, further to the universal definition outlined above:

Persons who flee their countries because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.⁵³

Whilst not engaging in a critical assessment of these definitions, two points ought to be highlighted. The first is the reference to gender as a Convention ground in the Bangkok principles supporting the arguments around gender in refugee law. The second is the reference to massive human rights violations and circumstances having disturbed public order in the Cartagena declaration, relevant on the basis of the premise that trafficking flourishes in situations of conflict or where public order is disturbed. The implications of these provisions, if any, for trafficking-based claims will be elaborated in the relevant chapters.

The European Union has taken a different approach. In part reflecting the strong European focus of the Geneva Convention, the EU framework adopts the refugee definition verbatim, going on to create subsidiary protection, a complementary form of protection covering persons who ‘would face a real risk of suffering harm’⁵⁴ but who do not fulfill the restrictive criteria for recognition as a refugee. This thesis focuses on the application of the refugee definition to trafficked persons and does not analyse the relevance of subsidiary protection in this context. The focus on refugee status is merited by the fact that this is a more durable form of protection

⁵³ Part III (3)

⁵⁴ See: Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast); OJ L 337/9, 20 December 2011, Article 2(f)

that grants beneficiaries more rights. It is also consistent throughout the globe, whilst complementary forms of protection beyond the European Union tend to be discretionary. It must however be noted that some commentators have argued that subsidiary protection offers a viable option for trafficked persons. In 2002 Piotrowicz noted how within the EU framework 'perhaps currently the greatest hope for victims of trafficking who give evidence, is under a subsidiary protection regime'.⁵⁵ It is unclear why this was restricted to those who assist the authorities.

Non-Refoulement

Directly related to the definition of refugee is the principle of non-refoulement, considered to be the foremost right of refugees. The term refers to the prohibition of sending an individual back to a country where he faces torture or ill-treatment. As former UN Special Rapporteur on torture Manfred Nowak puts it:

In general, the principle sets out that a State violates the absolute prohibition of torture even in cases in which authorities expel or extradite a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.⁵⁶

The key sources of the principle are Article 33 of the Geneva Refugee Convention,⁵⁷ the Convention Against Torture, the European Convention on Human Rights, and the Inter-American Convention to Prevent and Punish Torture, as well as the American Convention on Human Rights. Whilst similar in result, a number of distinctions exist between these sources. The Geneva Refugee Convention provision applies only to

⁵⁵ Ryszard Piotrowicz, 'European Initiatives in the Protection of Victims of Trafficking Who Give Evidence Against Their Traffickers' (2002) 14 International Journal of Refugee Law 263, 275

⁵⁶ See: Manfred Nowak and others, *The United Nations Convention against Torture: A Commentary* (Oxford University Press 2008) 127. See also: Manfred Nowak, *Trafficking in Human Beings Amounting to Torture and other Forms of Ill-treatment* (Organisation for Security and Co-operation in Europe 2012) 30

⁵⁷ Article 33 provides that: No contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

refugees and, by extension asylum seekers and therefore requires a connection between the harm threatened and a Convention ground, and is subject to exceptions where there are reasonable grounds for regarding a particular refugee as a danger to the security of the host State, or when the individual refugee, having been finally convicted of a particularly serious crime, constitutes a danger to the community of that country.⁵⁸ In contrast to this, non-refoulement under the United Nations Convention against Torture does not require a 'Convention ground nexus'. It is absolute (i.e. not subject to exceptions) but is limited only to situations of torture and not to other forms of ill treatment.⁵⁹ Under the European Convention on Human Rights, protection is extended to all treatment that violates article 3,⁶⁰ is not subject to exceptions and does not require a Convention ground nexus. This is therefore the broadest protection against refoulement currently in force (with the obvious geographical restriction of applying only to States Party to the European Convention).

Torture

Closely linked to this, and relevant for the discussion of persecution in Chapter 4, is the definition of torture. Article 1 of the Convention Against Torture provides:

The term torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing

⁵⁸ Article 33(2) provides that: The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

⁵⁹ The Convention provides that: 'no State shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.

⁶⁰ Article 3 provides that: No one shall be subjected to torture or to inhuman or degrading treatment or punishment. The European Court has held that this provision extends to any form of return to a country where there is a risk of such treatment. See: *Chahal v. The United Kingdom*, 70/1995/576/662, Council of Europe: European Court of Human Rights, 15 November 1996. See also: B Rudolf, 'Chahal v. United Kingdom. No. 70/1995/576/662' (1998) 92 *The American Journal of International Law* 70

him for an act he or a third person has committed or is suspected to have committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent to or incidental to lawful sanction.

There are therefore four requirements emanating from this definition: infliction of severe pain or suffering, intention to inflict such pain, the involvement of a public official, and a specific purpose. In general, torture occurs in circumstances where the torturer exercises unrestricted power over the tortured.⁶¹

Part 3: Mapping the Context

State obligations with regard to human trafficking derive from a wide array of legal instruments in a variety of areas of law, at the global and regional levels, and through a variety of legal vehicles. This section attempts to map out the most important instruments and their relevance to trafficking-based asylum claims. The location of specific instruments and provisions influences the way human rights concerns are mainstreamed, or otherwise, in these instruments and as such it is also relevant to discuss the context in which specific instruments were adopted. This locus also impacts on the potential for enforcement of the legal obligations and the institutional framework for their implementation. The legal environment of trafficking is a complex one, incorporated in instruments from across a whole spectrum of legal disciplines including at a minimum: human rights, humanitarian law, migration law, gender and child specific instruments, slavery instruments as well as development

⁶¹ Nowak and others (n 51) 1

related instruments. Whilst the link is explicit in many of these, in other the relevance of the instrument to trafficking is implicit.

A legal mapping around human trafficking is particularly interesting with regard to how it brings together various areas and types of laws. Primarily profit driven, human trafficking has a strong human rights component, and in certain circumstances meets the requirements for making international humanitarian law relevant.⁶² We start by addressing trafficking specific instruments and the context in which they were adopted.

As Jean Allain rightly highlights ‘within the European context, the various types of human exploitation enumerated in the European Convention Against Trafficking have an established treaty regime attached to each of them’.⁶³ Except for the CoE Convention on Human Rights and Biomedicine to which he refers, the other instruments are of universal reach and therefore applicable to the Protocol as well as the CoE Convention.

3.1 Human Trafficking

3.1.1 Specific Anti-Trafficking Instruments

The *sine qua non* of international instruments on combatting human trafficking is the Trafficking Protocol adopted in 2001. As Gallagher notes, and Dorevitch and Foster replicate, the Protocol is the single most important legal instrument on trafficking.⁶⁴ Whilst not a standalone instrument, the Protocol is the first modern instrument to

⁶² For instance when the trafficking is carried out as part of a widespread measure within the context of conflict.

⁶³ Allain (n 23) 7

⁶⁴ Anna Dorevitch and Michelle Foster, ‘Obstacles on the Road to Protection: Assessing the Treatment of Sex-trafficking Victims under Australia's Migration and Refugee Law’ (2008) 9 Melbourne Journal of International Law 1, 5

address human trafficking, and is the underlying inspiration for other specialised instruments. In many countries, it remains the only binding international treaty on the issue of human trafficking. Of particular relevance is the shift, in and through the Protocol, away from trafficking as limited to the movement of women for exploitation in the sex industry to the now accepted broad definition of human trafficking as including multiple forms of recruitment, means and intended exploitation. In many ways it represents and signifies the second phase of global anti-trafficking instruments and the modern understanding of trafficking. The Protocol, as well as the Convention it supplements, was adopted within the remit of the United Nations Office on Drugs and Crime, which explains the criminal justice approach it promotes.

Previous anti-trafficking instruments include the 1949 United Nations Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others.⁶⁵ As the UNODC rightly notes this Convention was a legal turning point as it was the first internationally binding instrument.⁶⁶ It was not however the first international instrument to address the issue of trafficking. Even prior to this, instruments included: the International Agreement of 18 May 1904 for the Suppression of the White Slave Traffic, as amended by the Protocol approved by the General Assembly of the United Nations on 3 December 1948,⁶⁷ the International Convention of 4 May 1910 for the Suppression of the White Slave Traffic, as amended by the 1948 Protocol, the International Convention of 30 September 1921 for the Suppression of the Traffic in Women and Children, as amended by the Protocol approved by the General Assembly of the United Nations on 20 October 1947 and the

⁶⁵ UN General Assembly, *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 2 December 1949, A/RES/317

⁶⁶ UNODC, 'Addressing Trafficking in Persons since 1949' www.unodc.org [last accessed: 5 October 2013]

⁶⁷ UNTS, Vol 92, p.19

International Convention of 11 October 1933 for the Suppression of the Traffic in Women of Full Age, as amended by the 1947 Protocol. The 1949 Convention focused exclusively on prostitution and trafficking related thereto and did not create a distinction between the two offences. These instruments are broadly considered to be the first phase of anti-trafficking instruments having been superseded by the second phase of anti-trafficking instruments centring primarily on the Trafficking Protocol.

At the regional and sub-regional level, the last decade has also seen the development of a number of important anti-trafficking instruments, most notably: the Council of Europe Convention on Action to Combat Human Trafficking, the European Union Framework Decision on Human Trafficking of 2002 (later replaced by the 2011 European Union Directive on Preventing and Combatting Human Trafficking) and the SAARC Convention. The instruments, coupled with the Protocol, make substantive provisions on anti-trafficking in contrast to other instruments that merely establish the prohibition of trafficking. They are the primary focus of the discussion in Chapter 2. Moreover, other national legal developments have been of particular relevance, most notably the US Trafficking Victim Protection Act of 1999⁶⁸ that, *inter alia*, mandated the creation of the annual Trafficking in Persons Report, prepared and issued by the US Department of State.⁶⁹

⁶⁸ *Victims of Trafficking and Violence Protection Act of 2000* [United States of America], Public Law 106-386 [H.R. 3244], 28 October 2000; See also: *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008* [United States of America], Public Law 110-457, 23 December 2008

⁶⁹ The relevance of the TIP Report for determining trafficking-based asylum claims becomes evident throughout the analysis of this thesis and is further elaborated in Chapter 7

3.1.2 General Human Rights Instruments

We now turn to the way human trafficking has been addressed in human rights instruments as recognition of the strong human rights dimension of trafficking. A general prohibition of trafficking can be found, directly or indirectly, in various human rights instruments. The Charter of Fundamental Rights of the European Union⁷⁰ (hereinafter the EU Charter) as well as the Arab Charter of Human Rights⁷¹ (hereinafter the Arab Charter) explicitly prohibit trafficking, whilst the American Convention on Human Rights specifically prohibits trafficking in women.⁷² The explicit reference in part reflects the time when these instruments were adopted.

Other human rights instruments include a prohibition of slavery, servitude and forced labour. These include: Article 4 of the Universal Declaration of Human Rights,⁷³ Article 8 of the International Covenant on Civil and Political Rights, Article 4 of the European Convention on Human Rights, Article 5 of the African Charter on Human and People's Rights.⁷⁴ In the *Rantsev v. Cyprus and Russia* judgment the European Court of Human Rights determined that human trafficking, as defined in the Protocol falls squarely within the purview of the Article 4 prohibition. We return to this judgment in subsequent chapters. This case built on the court's previous judgment in *Siliadin v.*

⁷⁰ European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (OJ C 364/01) Article 5(3) provides that 'trafficking in human beings is prohibited'

⁷¹ League of Arab States, *Arab Charter on Human Rights*, 15 September 1994; Article 10 provides that: All forms of slavery and trafficking in human beings are prohibited and are punishable by law. No one shall be held in slavery and servitude under any circumstances. Forced labour, trafficking in human beings for the purposes of prostitution or sexual exploitation, the exploitation of the prostitution of others or any other form of exploitation or the exploitation of children in armed conflict are prohibited

⁷² Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969; Article 6(1) provides that: No one shall be made subject to slavery or involuntary servitude, which are prohibited in all their forms as are the slave trade and traffic in women

⁷³ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III); Article 4 reads: No one shall be held in slavery or servitude

⁷⁴ Article 5 provides that: All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

*France*⁷⁵ and was followed by further judgments in *C.N v UK*⁷⁶ and *C.N & V. v. France*.⁷⁷ Being a critical point in law making in the area, the case has received extensive academic attention including, *inter alia*, by Allain,⁷⁸ Kneebone,⁷⁹ Stoyanova⁸⁰ and Piotrowicz,⁸¹ and remains good law in its area of relevance. Whilst the judgment is geographically limited, its interpretation of the relevant prohibitions is exemplary also to courts beyond the European context because of the similarity between Article 4 of the ECHR and provisions in other international human rights treaties. This judgment also highlights the relevance of anti-slavery instruments to the normative framework around human trafficking. We will come back to this shortly.

Moreover, other rights enshrined in the relevant international human rights instruments are also relevant to anti-trafficking including, *inter alia*: the prohibition of torture, cruel and inhumane treatment,⁸² the right to the enjoyment of just and favourable conditions of work,⁸³ the prohibition of arbitrary detention, the right to life, liberty and security of person, the right to an effective remedy, freedom of

⁷⁵ It is interesting to note that whilst the issue of trafficking was raised in this case, the court did not make any explicit mention thereto

⁷⁶ *C.N. v. the United Kingdom*, Application no. 4239/08, Council of Europe: European Court of Human Rights, 13 November 2012

⁷⁷ *C.N and V. v. France*, Application no. 67724/09, Council of Europe: European Court of Human Rights, 11 October 2012

⁷⁸ Allain (n 23)

⁷⁹ Kneebone (n 16)

⁸⁰ Vladislava Stoyanova, 'Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev case' (2012) 30 *Netherlands Quarterly of Human Rights* 163

⁸¹ Ryszard Piotrowicz, 'States' Obligations under Human Rights Law Towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations' (2012) 24 *International Journal of Refugee Law* 181

⁸² Established *inter alia* in Article 5 of the Universal Declaration of Human Rights

⁸³ Enshrined *inter alia* in Article 7 of the International Covenant on Economic, Social, and Cultural Rights

movement, prohibition of the arbitrary deprivation of property, right to rest and leisure.⁸⁴

3.1.3 Specialised Human Rights Instruments

Action against human trafficking is also required under a number of specialised human rights instruments including those on women's and children's rights. The most relevant women's rights instruments include: the Convention on the Elimination of all forms of Discrimination against Women (hereinafter CEDAW),⁸⁵ the Declaration on the Elimination of all forms of Violence Against Women hereinafter DEVAW),⁸⁶ and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.⁸⁷ Article 6 of CEDAW obliges States to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women. DEVAW rightly brings trafficking in women and forced prostitution within the definition of violence against women.⁸⁸ Trafficking, as a form of violence against women, is a violation of the prohibition of sex-based discrimination as set out in Article 1 of CEDAW. The African Women Protocol provides, within the context of the right to life, integrity and security of persons that: States shall take appropriate and effective measures to prevent and condemn

⁸⁴ Enshrined in Article 24, UDHR

⁸⁵ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, 13

⁸⁶ UN General Assembly, *Declaration on the Elimination of Violence Against Women*, 20 December 1993, A/RES/48/104

⁸⁷ African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003

⁸⁸ Article 2 provides that: Violence against women shall be understood to encompass, but not be limited to, the following: (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation; (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution

trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk.⁸⁹

Article 35 of the Convention on the Rights of the Child makes similar provisions, obliging States to: take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of, or traffic in, children for any purpose or in any form. This obligation is further elaborated in the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography which obliges States to prohibit the sale of children, to prohibit child prostitution and to prohibit child pornography.⁹⁰ Whilst the substantive provisions of the Protocol do not explicitly refer to trafficking, the reference to the sale of children, and the engagement of children in prostitution and pornography, bears clear relevance to the fight against trafficking. This is further substantiated by the references to trafficking in the preamble of the same where States Parties express grave concern 'at the significant and increasing international traffic in children for the purpose of the sale of children, child prostitution and child pornography'.⁹¹ On a regional level, measures against child trafficking are also mandated through the African Charter on the Rights and Welfare of the Child, and through the SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia. The former obliges States to take appropriate preventive measures,⁹² whilst the

⁸⁹ Article 4(2)G

⁹⁰ UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 25 May 2000, A/RES/54/263

⁹¹ Ibid Para 3

⁹² Provides that: States Parties to the present Charter shall take appropriate measures to prevent: the abduction, the sale of, or trafficking of children for any purpose or in any form, by any person including parents or legal guardians of the child and the use of children in all forms of begging

latter refers to the social safety nets to be made available to protect children from trafficking.⁹³

3.1.4 Anti-Slavery Legislation

The fight against slavery is possibly one of the oldest human rights challenges. The relevance of the concept of slavery to trafficking and counter-trafficking has been briefly outlined above. Discursively the link has been made by many who refer to human trafficking as modern day slavery and to trafficked persons as slaves. Academically much attention has been spent on whether the legal concept of 'slavery' *per se* can encapsulate all manifestations of trafficking or whether indeed a legal dividing line between the two ought to be better drawn.⁹⁴ Other academics have taken the approach of the European Court of Human Rights and referred loosely to the term slavery as encompassing human trafficking. Juss, for instance, speaks of the nature of trafficking as a form of modern slavery, as an important dimension to understanding both the phenomenon of trafficking and the protection needs of trafficked persons.⁹⁵ Hathaway, on the other hand, argues that the focus on human trafficking has taken the attention off the broader issue of slavery and exploitation by limiting international attention, efforts and funding to a small subset of the world's slaves.⁹⁶ These debates notwithstanding, anti-slavery laws form part of the broader legal tapestry in which anti-trafficking instruments operate. It is therefore worth

⁹³ Article IV 3(a) provides that States Parties shall ensure that appropriate legal and administrative mechanisms and social safety nets and defences are always in place to ensure that their national laws protect the child from any form of discrimination, abuse, neglect, exploitation, torture or degrading treatment, trafficking and violence

⁹⁴ See for example: Allain (n 23), Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (Oxford University Press 2008)

⁹⁵ Satvinder Juss, 'Human Trafficking, Asylum and the Problem of Protection' (n 2)

⁹⁶ Hathaway (n 33) See also in response: Anne Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A response to James Hathaway' (2009) 49 *Virginia Journal of International Law* 789

noting their relevance including: the 1926 League of Nations Slavery Convention⁹⁷ and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.⁹⁸

3.1.5 International Labour Law

Within the broad remit of international labour law one notes the involvement of the international labour organisation in combatting forced labour and trafficking. A number of international labour law instruments are relevant to counter trafficking, most notably ILO Convention No. 29 concerning Forced or Compulsory Labour (1930). The ILO identifies a clear link between the Protocol and ILO Convention No. 29 highlighting that the only type of exploitation specified in the Protocol's definitional article that is not also covered by the ILO Convention is trafficking for the removal of organs.

Other relevant instruments include: Convention No. 105 Concerning the Abolition of Forced Labour (1957) and Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour. The latter defines worst forms of child labour by direct reference to trafficking. Beyond these specific instruments a number of other ILO Conventions cover trafficked persons as workers or migrants workers. These include amongst others: Convention No. 143 Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (1975),⁹⁹ and the Migration for

⁹⁷ League of Nations, *Convention to Suppress the Slave Trade and Slavery*, 25 September 1926, 60 LNTS 253, Registered No. 1414

⁹⁸ United Nations, *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 7 September 1956, UNTS 266, 3

⁹⁹ International Labour Organisation (ILO), *Migrant Workers (Supplementary Provisions) Convention, C143*, 24 June 1975, C143

Employment Convention (1949).¹⁰⁰ The former makes a number of pertinent requirements including: the prosecution of persons responsible for manpower trafficking, and the imposition of civil or criminal sanctions for organising migration into abusive working conditions, illegal employment, as well as for the trafficking of migrant workers. Within the context of trafficking-based asylum claims these instruments can provide a contextual oversight of the State obligations and standards against which State commitments and efforts can be assessed.

3.1.6 Soft Law

The framework around human trafficking includes ‘a considerable body of soft law of the instrumentalist kind, some of which has been clearly normative in intent and much of which has been of the “promotional inspiration” variety’.¹⁰¹ Whilst not legally binding, at the very minimum, these instruments reflect the understanding and position of the relevant entities on particular issues, including any unclear terms in the binding documents. They play a non-binding complementary role to the standards and requirements set out in treaty law.

Critical amongst these are the 2002 United Nations Guidelines on Human Rights and Human Trafficking, often considered the blueprint of the human rights approach to human trafficking and to which reference is made throughout this thesis. The guidelines were an internal United Nations process in which States did not have direct input, and have never been put to States for their consideration and formal adoption. The instrument promotes a number of principles that, it recommends, should underpin anti-trafficking measures. These relate to: the primacy of human rights,

¹⁰⁰ International Labour Organisation (ILO), *Migration for Employment Convention (Revised)*, C97, 1 July 1949, C97

¹⁰¹ Gallagher, *The International Law of Human Trafficking* (n 18) 140

measures for prevention, protection and assistance and measures around criminalisation, punishment and redress. It then moves on to set out a set of eleven (11) guidelines including on: the promotion and protection of human rights, the identification of trafficked persons and traffickers, research, analysis, evaluation and dissemination (of findings), ensuring an adequate legal framework, ensuring an adequate law enforcement response, protection and support for trafficked persons, preventing trafficking, special measures for the protection and support of trafficked children, access to remedies, the obligations of peacekeepers, civil police and humanitarian and diplomatic personnel, and cooperation and coordination between States and regions.

In order to promote an adequate implementation of the relevant international obligations a number of international organisations, most notably the United Nations Office on Drugs and Crime, have issued a series of instruments and tools to support States Parties in their efforts to combat human trafficking. These instruments are intended to assist States in meeting their obligations to combat trafficking. They can be useful tools in informing an assessment of a country's willingness and ability to effectively protect an asylum applicant with trafficking related claims. Examples of these instruments include: the Model Law against Trafficking in Persons (2010),¹⁰² the International Framework for Action to Implement the Trafficking in Persons Protocol (2010),¹⁰³ the needs assessment toolkit on the criminal justice response to human trafficking (2010),¹⁰⁴ the Combatting Trafficking in Persons: A Handbook for

¹⁰² UN Office on Drugs and Crime (UNODC), *Model Law against Trafficking in Persons* (United Nations 2005)

¹⁰³ UN Office on Drugs and Crime (UNODC), *International Framework for Action: To Implement the Trafficking in Persons Protocol* (United Nations, 2009)

¹⁰⁴ UN Office on Drugs and Crime (UNODC), *Needs Assessment Toolkit on the Criminal Justice Response to Human Trafficking* (United Nations, 2010)

Parliamentarians (2009),¹⁰⁵ the Toolkit to Combat Trafficking in Persons (2006, 2008)¹⁰⁶ and the Anti-Human Trafficking Manual for Criminal Justice Practitioners (2008).¹⁰⁷ It is positive to note that these instruments are readily available online and thereby accessible to legal advisors, courts, as well as policy makers and academics. It is also encouraging to note the active engagement of a number of academics in the preparation and development of these resources.

Action plans and strategies are another form of soft law instruments with considerable impact on State action. Examples at the international and regional level include: the United Nations Plan of Action on Human Trafficking¹⁰⁸ and the EU Strategy towards the Eradication of Trafficking in Human Beings (2012-2016).¹⁰⁹ Many countries have also adopted national action plans. Moreover, specialised instruments have also been developed by relevant UN agencies and international organisations, including, for instance: the Guidelines for the Protection of Child Victims of Trafficking developed by the United Nations Children's Fund (UNICEF) and 'Caring for Trafficked Persons: Guidelines for Health Providers' developed by the International Organisation for Migration in collaboration with the London School of Hygiene and Tropical Medicine.¹¹⁰

Beyond these soft law instruments, trafficking has also been subject to a number of General Assembly and Human Rights Council Resolutions including: GA Resolution

¹⁰⁵ UN Office on Drugs and Crime (UNODC), *Combating Trafficking in Persons: A Handbook for Parliamentarians* (United Nations, 2009)

¹⁰⁶ UN Office on Drugs and Crime (UNODC), *Toolkit to Combat Trafficking in Persons, Second Edition* (United Nations, 2008)

¹⁰⁷ UN Office on Drugs and Crime (UNODC), *Anti-Human Trafficking Manual for Criminal Justice Practitioners* (United Nations, 2009)

¹⁰⁸ UN General Assembly, *United Nations Plan of Action on Human Trafficking*, (United Nations, 2010)

¹⁰⁹ European Commission, *EU Strategy towards the Eradication of Trafficking in Human Beings (2012-2016)*, (European Union 2012)

¹¹⁰ Cathy Zimmerman and Rosilyne Borland (eds), *Caring for Trafficked Persons: Guidelines for Health Providers* (IOM 2009)

62/132 on violence against women migrant workers (2007), GA Resolution 61/180 on improving the coordination of efforts against trafficking in persons (2006), GA Resolution 61/144 on the Traffic in women and girls (2006) and GA resolution 58/137 on strengthening international cooperation in preventing and combatting trafficking in persons and protecting victims of such trafficking (2003). Similarly on a regional level, various decisions and resolutions have been passed relating to trafficking. To take the example of the OSCE for instance, which have been an active stakeholder in the global fight against trafficking, one can refer to: Ministerial Council Decision (MCD) No. 8/07 on combatting trafficking in human beings for labour exploitation (2007), MCD No. 14/06 on enhancing efforts to combat trafficking in human beings, including for labour exploitation, through a comprehensive and proactive approach (2006) and MCD No. 13/04 on the special needs for children victims of trafficking for protection and assistance (2004). Whilst it would be redundant to list all the resolutions and declarations of relevance to human trafficking, this limited sample should suffice to illustrate the considerable political attention being given to the issue.

Whilst a detailed overview of the national implementation of the relevant provisions is beyond the scope of the present research, it is pertinent to address this at the general level. Whilst few States have a single comprehensive anti-trafficking act, counter-trafficking measures are often included in the national criminal codes (in so far as the crime of trafficking and the prosecution of offenders is concerned), and in the national immigration law (as concerns the rights to remain as a trafficked person). Both trafficking and asylum are areas in which policy is a critical consideration and a number of provisions are made in policy rather than law.

All of this notwithstanding, a number of issues remain. Human trafficking continues to be on the rise, it remains one of the more profitable international crimes, and many traffickers continue to act with impunity. The risks for traffickers are low whilst profits are large. The protection of trafficked persons remains low on the agenda as will be seen in Chapter 2. We turn now to map out the legal provisions on asylum, another area in which hard and soft law instruments merge.

3.2 Refugee Law

The same human rights instruments noted above also make provisions regarding asylum and international protection. The right to seek asylum is provided for in the Universal Declaration of Human Rights, the African Charter, the American Convention, the Arab Charter, the Bangkok Principles, and the EU Charter, whilst a corresponding obligation on States to grant asylum is also incorporated in the relevant provisions of the African Charter, the American Convention and the EU Charter. The general human rights framework has, moreover, become the standard threshold against which persecution is assessed whilst human rights grounds against deportations have now become commonplace.

The *sine qua non* of refugee law is the 1951 Refugee Convention¹¹¹, which both defines the concept of 'refugee' and outlines the rights to which refugees are entitled. The focus of this thesis will be on the former, and specifically on the application of the refugee definition to trafficked persons. On a regional level a series of other instruments have been adopted including:

- The African Convention on the situation of refugees in Africa, adopted by the

¹¹¹ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, 137

Organisation for African Unity in 1969¹¹²

- The Cartagena Declaration, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama held in 1984 and later adopted by the Organisation of American States¹¹³
- The Bangkok Principles, adopted at the AALCO's 40th Session in 2001¹¹⁴
- The Common European Asylum System including the Directive on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)¹¹⁵

3.2.1 UNHCR Guidelines and Soft Law

Of critical relevance to trafficking-based asylum claims are the Guidelines on International Protection on the application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked issued by UNHCR in 2006.¹¹⁶ The latter is of particular interest to the present study. The guidelines are just one of a set of guidelines issued regularly by the agency aimed at ensuring consistent interpretation of the Convention with regard to various current issues in refugee law. Other

¹¹² Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*, 10 September 1969, 1001 U.N.T.S. 45

¹¹³ Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, *Cartagena Declaration on Refugees*, 22 November 1984

¹¹⁴ Asian-African Legal Consultative Organization (AALCO), *Bangkok Principles on the Status and Treatment of Refugees ('Bangkok Principles')*, 31 December 1966

¹¹⁵ European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L 337; December 2011, 9-26

¹¹⁶ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 7: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*, 7 April 2006, HCR/GIP/06/07

guidelines cover: gender related persecution (2001),¹¹⁷ membership of a particular social group (2002),¹¹⁸ cessation of refugee status (2003),¹¹⁹ internal flight alternative (2004),¹²⁰ exclusion clauses (2005),¹²¹ religion based refugee claims (2006),¹²² child asylum claims (2009)¹²³ and LGBTI and Gender Identity claims (2012).¹²⁴ The guidelines address some of the uncertainties and gaps left by the Refugee Convention. They are not legally binding and are intended to provide interpretative legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as for UNHCR staff carrying out refugee status determination in the field.¹²⁵ The guidelines are further to, and complement, the UNHCR Handbook that remains a critical feature of the UNHCR's interpretative framework.

The UNHCR Trafficking Guidelines remain the only soft law instrument at the universal level addressing trafficking-based asylum claims. The guidelines are divided

¹¹⁷ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01 (hereinafter: the UNHCR Gender Guidelines)

¹¹⁸ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 2: "Membership of a Particular Social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 7 May 2002 (HCR/GIP/02/02) (hereinafter: the UNHCR PSG Guidelines)

¹¹⁹ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, 10 February 2003 (HCR/GIP/03/03)

¹²⁰ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 23 July 2003 (HCR/GIP/03/04)

¹²¹ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 5: Application of the Exclusion Clauses under Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003 (HCR/GIP/03/05)

¹²² UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 28 April 2004 (HCR/GIP/04/06)

¹²³ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08

¹²⁴ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012

¹²⁵ Ibid, 1

into: preliminary provisions, definitional issues (which focus around the definition of trafficking as included in the Protocol), substantive issues relating to the refugee definition, the issue of statelessness, and trafficking and procedural factors in trafficking-based asylum claims. An assessment of the usefulness and validity of the guidelines, and the way various courts and tribunals have engaged therewith, is attempted in Chapter 7.

Within the broader UNHCR framework trafficking also features in the Guidelines on International Protection on Gender-related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the status of Refugees¹²⁶ which identifies trafficking for the purposes of forced prostitution or sexual exploitation as a form of persecution, highlighting that some trafficked women or minors may have valid claims to refugee status.¹²⁷ The exclusion of men in this context, despite the reference to the Protocol Definition of Trafficking, is noteworthy. Other guidelines by UNHCR are also relevant to trafficking-based asylum claims, including the guidelines on membership in a particular social group and on child asylum claims. These guidelines are only a part of UNHCR's engagement with anti-trafficking measures. The 2003 Agenda for Protection called on States to ensure that their own asylum processes are open to receiving claims by individual trafficked persons.¹²⁸

A number of non-binding Executive Committee decisions are also relevant, including: No. 84 on refugee children and adolescents (1997), No. 96 (LIV) on the Return of

¹²⁶ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01

¹²⁷ *Ibid*, Para 18

¹²⁸ UN High Commissioner for Refugees (UNHCR), *Agenda for Protection*, October 2003, Third edition

Persons found not to be in need of international protection (2003), No. 97 on Protection Safeguards in Interception Methods (2003), No. 98 on Protection from Sexual Abuse and Exploitation (2003), No. 105 on women and girls at risk (2006), No. 106 on identification, prevention and reduction of statelessness and protection of stateless persons (2006), and No. 107 on Children at risk, as well as the General Conclusions on international protection (1999, 2001, 2008). On various occasions UNHCR documents deal with trafficking and smuggling issues concurrently, whilst, in the most part, the emphasis is on the protection of displaced persons from the risk of trafficking. As Kneebone identifies, UNHCR's engagement with human trafficking over the last decade indicates an evolving and increasingly nuanced understanding of the phenomenon,¹²⁹ going from an exclusive focus on women and children, to the acknowledgement that men, and specifically boys, are also at risk of trafficking. In the UNHCR's own words:

UNHCR's interventions and activities in the area of human trafficking are based on the premise that this specific crime may entail abuses or serious threats to the human rights of the victims and that an international protection response may be called for to ensure the well being of the persons concerned.¹³⁰

A number of specific regional instruments have also been developed, including the Anti-Trafficking Manual for Central America and the Caribbean, the ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases (2010), and the Training Manual: Assistance for the Implementation of the ECOWAS Plan of Actions against Trafficking in Persons. These instruments aim to adopt a regional focus on the general principles.

¹²⁹ Ibid, 139

¹³⁰ UNHCR, 'Human Trafficking and Refugee Protection: UNHCR's Perspective' (Ministerial Conference on Towards Global EU Action Against Trafficking in Human Beings) para 5.

Beyond these strictly determinant areas of law, a number of other fields are also of relevance including:

- International Criminal Law and International Humanitarian Law including the definitions of enslavement in the various statutes of tribunals and in the Rome State of the International Criminal Court¹³¹
- International instruments around corruption and good governance, including the United Nations Convention Against Corruption¹³²
- International and regional instruments on organ transplants, including the Council of Europe Convention on Human Rights and Biomedicine¹³³
- International migration law including the International Convention on the Protection of all Migrant Workers and Members of their Families (1990)¹³⁴
- International obligations and commitments on development, including the Millennium Development Goals, and in particular goal 1 (eradication of extreme poverty and hunger), goal 2 (universal primary education) and goal 3 (promoting gender equality and empowerment of women).¹³⁵

From an institutional standpoint, recent years have seen a flurry of new positions being created to deal with the issue of trafficking. Various international and regional organisations have set up special rapporteurs or equivalent positions. These include: the United Nations Special Rapporteur on trafficking in persons especially women and

¹³¹ UN General Assembly, *Rome Statute of the International Criminal Court*, 17 July 1998 ((last amended 2010))

¹³² UN General Assembly, *United Nations Convention Against Corruption*, 31 October 2003, A/58/422

¹³³ Council of Europe, *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*, 4 April 2007, European Treaty Series No. 164.

¹³⁴ UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158

¹³⁵ See in general: UN Office of the High Commissioner for Human Rights (OHCHR), *Claiming the Millennium Development Goals: A human rights approach*, 2008, HR/PUB/08/3

children, the OSCE Special Representative and Coordinator for combatting trafficking in human beings and the EU anti-trafficking coordinator.

As Juss rightly highlights: ‘human trafficking straddles disciplines as diverse as law enforcement, human rights, gender rights, asylum protection, health and social services’.¹³⁶ This brief exercise of legal mapping identifies the mesh of intersections between various areas of law, as well as the need for policy coherence between areas of law with different (and sometimes apparently contrasting) legal and policy objectives. Table 2 below provides an chronological representation of the relevant instruments.

Year	Entity	Instruments
1949	United Nations	White Slave Traffic Convention
1951	United Nations	Geneva Refugee Convention
1979	United Nations	Convention on the Elimination of all forms of Discrimination Against Women
2000	United Nations	Trafficking Protocol
2002	OHCHR	Guidelines and Principles on Human Rights and Human Trafficking
2002	European Union	Framework Decision

¹³⁶ Juss (n 2) 282

2004	European Union	European Union Qualification Directive
2005	Council of Europe	Trafficking Convention
2006	UNHCR	UNHCR Trafficking Guidelines
2011	European Union	Re-Cast Qualification Directive
2011	European Union	Anti-Trafficking Directive

Table 2: Chronological Schedule of Most Pertinent International and Regional Instruments

Part 4: Methodology

The method adopted for this research combines desk research with a complementary component of qualitative research. The desk research consists of three key elements: a legal review, an academic review and an independent body review. The legal review involves an analysis of relevant legal instruments and in-depth reviews of existing jurisprudence from selected courts and tribunals. The academic review engages with prominent, as well as alternative theoretical and analytical works in the area. The independent body review is an open analysis of both studies and analytical tools employed by organisations and bodies engaged in relevant fields, including policy documents and reports prepared by NGOs, IGOs, think tanks and other organisations, as well as indices and other assessment tools against which issues such as protection standards, policing and corruption are measured.

The approach taken is inductive, where general conclusions are reached on the basis of hypothesis tested on specific cases. The research hypothesises that trafficked

persons are eligible for refugee status. This was tested against the literature, and the case law assessed.

The emphasis on case law stems from Goodwin Gill's thesis;

that states, interpreting and applying the 1951 Convention relating to the Status of Refugees through their legislation, courts and tribunals, ought to have some regard to relevant case law from the jurisdictions of other states party to the Convention.¹³⁷

This reflects the transnational nature of refugee law. Part II below identifies some of the cross-country inter-relations in judgments and specifically whether courts refer to the jurisprudence of other States in their determinations. The research attempts to identify divergences between jurisdictions, but more importantly to highlight similarities of approaches and the applicability and legal soundness of approaches that ensure that refugee protection is not denied to persons for whom it might be the only realistic option of protection.

Identifying and finding case law to analyse has been a critical challenge to this research. Goodwin Gill identifies how: 'the opportunities for the transnational dissemination and use of comparative jurisprudence could hardly be more favourable, as increasing numbers of refugee decisions are available on the Web, either sponsored by the national refugee determination authority, or through the medium of third party legal information institutes with multi-jurisdictional content.'¹³⁸ Cases analysed in the course of this research were found on various databases to which Goodwin Gill alludes, most notably: the UNHCR RefWorld

¹³⁷ Guy Goodwin Gill, 'The Search for the One, True Meaning', in G.S. Goodwin Gill/H. Lambert (eds.), *The Limits of Transnational Law: Refugee Law, Policy Harmonisation and Judicial Dialogues in the European Union* (Cambridge University Press 2010) 204

¹³⁸ Ibid 204

Database,¹³⁹ The University of Michigan Law School's Refugee Case law site,¹⁴⁰ the databases of national courts and tribunals,¹⁴¹ as well as specialised databases, including the database of the Centre for Gender and Refugee Studies at the University of California¹⁴² and the human trafficking case law database of the UNODC.¹⁴³ However these websites do not contain all of the decisions made in the specific jurisdictions and not all cases are explicitly coded. Finding cases was therefore challenging. The reluctance of courts and tribunals to make some of the decisions public is understandable considering the type of information often included in such judgments and the need to ensure the privacy of persons concerns.

On multiple occasions these databases produced overlapping, and sometimes identical results. Some databases, including RefWorld, reference 'trafficking in persons' as a specific search term. Other terms were also used including: forced labour, slavery, forced prostitution, enslavement, and organ removal. Beyond the primary focus on trafficking-based asylum claims, other judgments were also used to inform the discussion. These mainly included well-known precedent-setting cases, but also less known judgments on related issues such as, for example, claims based on HIV/AIDS Status.

Attempts to receive unpublished cases from lawyers and organisations working in the field were not successful, in the main part because of the lawyers' busy schedules and their reluctance to share such documents without the client's express consent. Whilst

¹³⁹ Available at: <http://www.refworld.org/> [last accessed: 5 October 2013]

¹⁴⁰ Available at: <http://www.refugeelaidinformation.org/case-law#sthash.AWk66tc7.dpuf> [last accessed: 5 October 2013]

¹⁴¹ A list of databases is provided by Goodwin-Gill GS and McAdam J, *The refugee in international law* (Third Edition edn, Clarendon press Oxford 2011)

¹⁴² Center for Gender and Refugee Studies Database available at: <http://cgrs.uchastings.edu/law/> [last accessed: 5 October 2013]

¹⁴³ Available at: <http://www.unodc.org/cld/index.jsp> [last accessed: 5 October 2013]

ethical clearance was obtained with regard to this research component, it was considered inappropriate to exert pressure on lawyers in this regard, considering the nature of the information and the lawyers' and clients' understandable reluctance.

The judgments were chosen from countries which have a developed asylum system, have addressed a significant number of trafficking-based asylum claims and for whom judgments are available via the relevant databases. Despite these common criteria the judgments vary considerably both between and within jurisdictions. UK judgments, especially from the upper tribunals and courts, tend to be considerably longer than the decisions in the US or Australia for instance, whilst Australian judgments lay out a very useful overview of the legal principles prior to delving into the facts of the particular case. An overview of the analysed cases is given in the next section.

To the extent possible the analysed case law was contextualised via broader reading regarding the asylum and trafficking policies in the country of asylum as well as the conditions in the country of origin. The volume and value of resources available varied considerably with the USA, UK and Australia having substantially more analysis than other jurisdictions. Similarly, Albania, Nigeria and Thailand have attracted greater research attention as countries of origin in the context of trafficking than most other countries. A number of general sources, including the US Trafficking in Persons Report and the reports of the United Nations Office on Drugs and Crime help provide information on the areas less researched. Moreover, various regional overviews have also been produced within both academic and policy literature that also address some of the information gaps.

Literature in this area is concurrently scant and plenteous. It is scarce in the sense that very little has been written or published specifically about trafficking-based asylum claims. It is plentiful in that both trafficking and asylum are subject to a considerable amount of publications and writing both within and beyond academic circles. Identifying the relevant and 'worthy' sources was therefore a challenge. The identification and selection of material was in part managed through a snowballing process whereby bibliographies and reference lists of sources were used to identify further sources. A number of sources were discovered through this approach and this proved to be an effective way of discovering published material which, whilst linked to different degrees to the research area, might have otherwise been difficult to uncover. Furthermore, searches on relevant journals in various disciplines and areas were also used to identify relevant sources, as were online search engines including Google scholar,¹⁴⁴ heinonline,¹⁴⁵ and westlaw.¹⁴⁶

Non-academic sources also proved invaluable in developing the research and identifying particular standards and requirements. These were gathered via the websites of various international governmental and non-governmental organisations. A number of practical handbooks were also used to identify the relevant sources.

Various components of the research were presented and discussed at academic conferences throughout the research period, whilst some of the ideas were raised and argued through informal conversations with experts in the field. The researcher's own contacts from before and during the research were used for this purpose. These stakeholders included: lawyers working in the area, NGO representatives and IGO

¹⁴⁴ www.scholar.google.com [last accessed: 5 October 2013]

¹⁴⁵ <http://home.heinonline.org/> [last accessed: 5 October 2013]

¹⁴⁶ <http://legalresearch.westlaw.co.uk/> [last accessed: 5 October 2013]

consultants. Whilst originally intended as fully-fledged interviews for which ethical clearance was obtained, it was soon discovered that such informal conversations about specific issues and arguments rendered significantly more useful results. These conversations happened at various events organized in London about the issue of trafficking where specific issues were raised and discussed. This approach allowed the researcher to approach individuals, explain the research, and then discuss with them specific issues or ideas that were most closely connected to their field of expertise. Interviews carried out often resulted in very general information being provided. These measures, coupled with ongoing discussions with the research supervisor, were a key methodological component in consolidating the research ideas.

Moreover, the researcher, on a number of occasions, attended the immigration tribunals in London and sat in on sessions, not all of which were trafficking related. The aim of this research element was to uncover the practical and procedural issues that arise during cases and how these are likely to impact on the clients. In order to avoid ethical issues only public hearings were attended. Whilst general notes were taken during the sessions, no case specific information was collected, as in some cases reporting on cases was prohibited. However, these sessions provided a glimpse into some of the substantive and procedural issues that arise in this context. They were complemented by further informal conversations with lawyers and Home Office representatives undertaken on the side of these sessions.

Throughout this thesis, examples are used to illustrate various points. The examples of conflict and re-trafficking are used to highlight heightened vulnerability, whilst the example of the Roma Community is used as an example to demonstrate the race dimension in both trafficking itself and the failure of State protection. These

examples do not mean that other contexts or groups are not equally targeted; they are merely intended as examples of broader issues which ought to be addressed on a case-by-case basis.

The jurisdictions reflect a mix of both common and civil law countries, and therefore the analysis combines different legal cultures and experiences. The analysis is made significantly easier by the existence of a common definition being applied by the courts meaning, that despite their differences, all the courts and tribunals are effectively interpreting the same legal content. This can be further broken down by the relevant tribunal or court in the specific country in order to provide a more detailed assessment.

In part because of the availability of decisions, and partly as a result of their legal standing, the vast majority of cases assessed came from higher asylum tribunals or courts. This means that they are likely to be influential cases in informing the decisions to first tier decision makers. The transnational nature of refugee law and of human trafficking raises the issue of judicial dialogue on these issues. A number of cases clearly stand out as particularly important both within and across jurisdictions. Whilst case law from some countries made no reference to cases from abroad, other jurisdictions remained more open, possibly reflecting the judicial culture. To this was added a consideration of other sources consulted, including academic sources and here a number of commonalities can also be identified. For instance, virtually all jurisdictions make reference to the US Trafficking in Persons report whilst the works of the prominent refugee law specialists including Guy Goodwin Gill and James Hathaway are referred to also in various cases.

¹⁴⁷ Hélène Lambert, 'Transnational Law, Judges and Refugees in the European Union *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union*' in G.S. Goodwin Gill/H. Lambert (eds.), *The Limits of Transnational Law: Refugee Law, Policy Harmonisation and Judicial Dialogues in the European Union* (Cambridge University Press 2010) 10

CHAPTER 2: NEXI AND JUSTIFICATION

Trafficking based asylum claims do not exist in a vacuum. They are one node of a broader complex of overlaps and intersections between trafficking and asylum within the broader mesh of international migration. Some of these overlaps are due to the practical implementation of the phenomena, whilst others are required or encouraged by the relevant legal frameworks. This chapter argues that these overlaps, coupled with the human rights violations inherent in trafficking, the protection imperative of asylum and the weak protection provisions of the anti-trafficking instruments, present a clear opportunity for the application of the humanitarian and human rights goals of asylum to protect trafficked persons.

This chapter is organised as follows: Part I reflects on the various nexi between trafficking and asylum, identifying the various points where the two phenomena and their practical execution meet. The aim here is to contextualise the discussion on trafficking based asylum claims within the broader interstices between the two areas. In so doing, it presents the processes at various stages including the recruitment and push factors, journey(s), entry into and stay in the territory, as well as the identification stages both as a person in need of protection and/or as a trafficked person. Part II then focuses on one of these intersects by positing that asylum offers a viable alternative channel for the long-term protection of trafficked persons. In addressing this point, the section provides an in depth assessment of the protection potential of the anti-trafficking instruments, interrogating whether and how refugee protection overcomes the identified shortcomings in the anti-

trafficking framework. It does so by reference to recent academic critiques and through the application of an adapted assessment framework.

Beyond identifying the overlaps between trafficking and asylum, the core claim of this chapter is that counter-trafficking instruments provide weak protection to trafficked persons, reflecting a primarily law enforcement agenda. Trafficked persons are instrumentalised as prosecutorial tools as State interests take precedence over their human rights. Despite protection being a stated purpose of most instruments, it is often limited in scope, presented in weak discretionary terms and made conditional on cooperation. Some of these shortcomings may be remedied through the protection opportunities found at the interstices with the Refugee Convention and International Refugee Law.¹ Indeed in many cases refugee status is a trafficked person's only meaningful opportunity for protection.² This too is not without its challenges. This in turn reflects the humanitarian nature of refugee law, and the need to ensure its openness to people who suffer human rights abuse and who would otherwise be denied effective protection. In so doing the chapter challenges the divide that is often seen between 'trafficked people' and 'refugee people' in international and national political discourse and practice, highlighting how the two 'groups' intersect and intertwine.

¹ Satvinder Juss, 'Human Trafficking, Asylum and the Problem of Protection' in Juss S. (ed), *The Ashgate Research Companion to Migration Law, Theory and Policy* (Ashgate 2012) 283

² Martina Pomeroy, 'Left Out in the Cold: Trafficking Victims, Gender, and Misinterpretations of the Refugee Convention's Nexus Requirement' (2009) 16 *Michigan Journal of Gender and the Law* 453, 462

Part 1: The Trafficking-Asylum Nexi

The demarcation between ‘migration’, ‘smuggling’, ‘trafficking’ and ‘asylum’ is blurred. Despite distinctive legal definitions, the phenomena intersect and intertwine as one overlaps with the next, creating the mesh that is often oversimplistically termed ‘international migration’. In reality the trafficking-asylum nexus cannot be adequately understood without reference to the migration-trafficking and asylum-migration nexi. Broadly speaking, the trafficking-migration nexus provides a pretext for restrictive immigration approaches. Such approaches, in turn negatively impact the asylum-trafficking nexus.³ Figure 5 below illustrates these relationships.

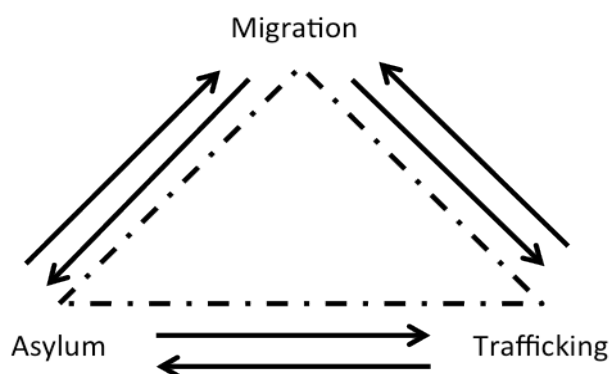


Figure 5: International Migration Mesh

The multiple points and levels of overlap reflect how both asylum and trafficking are complex, multi-faceted phenomena involving multiple stakeholders cutting across a variety of policy aims and objectives. As Figure 5 illustrates, the process of human trafficking and the process of seeking international protection intersect both in

³ See in this regard: Susan Kneebone, ‘The Refugee–Trafficking Nexus: Making Good (The) Connections’ (2010) 29 Refugee Survey Quarterly 137

practice and in the laws and policies aimed at addressing them. We now turn to address briefly each of these in turn.

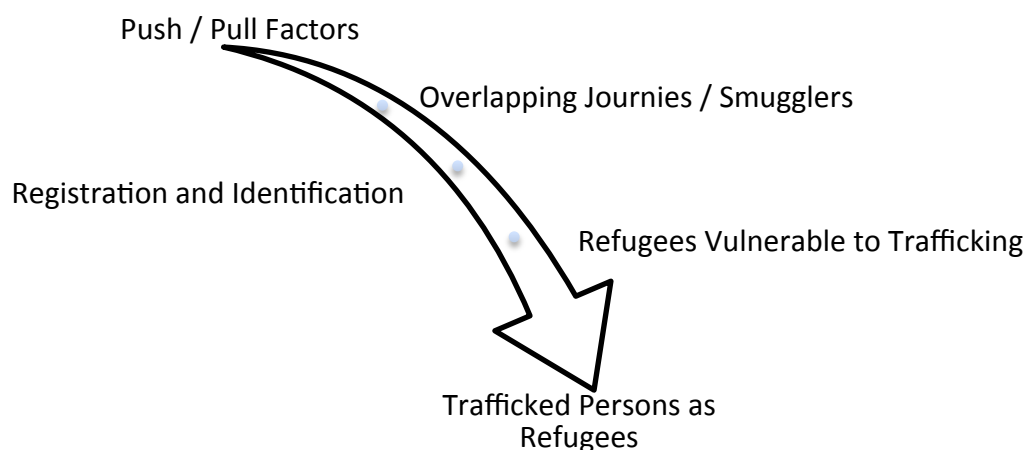


Figure 6: Overlaps along the Migration Continuum

A first point of intersection between the phenomena is the causes, or push factors, of flight. Kneebone argues that ‘there is a clear nexus between the circumstances which create refugees and those which lead to trafficking’.⁴ She refers to structural factors that lead to trafficking (including the social and economic exclusion of minorities, severe forms of discrimination, economic under-development, domestic violence, corruption, poverty and conflict) and argues that some of these may also be considered, whether due to severity or repetition, as meeting the threshold of persecution as required by the Refugee Convention and other instruments of international protection. Moreover, armed conflict and strife both cause displacement and increase the likelihood of trafficking.⁵ The link between conflict and displacement is well appreciated; however ‘well researched or systemic data on

⁴ Ibid

⁵ Megan Bastick, Karin Grimm and Rahel Kunz, *Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector* (Geneva Centre for the Democratic Control of Armed Forces 2007)

trafficking in relation to armed conflict is rare'.⁶ Trafficking for sexual enslavement has been documented as a practice in various conflicts including the so called comfort women of Japan in world war II⁷ and more recently conflicts in, *inter alia*, Angola, Sierra Leone and the Democratic Republic of Congo.⁸ Links have also been drawn between increased trafficking and post-war periods, including peace-keeping missions.⁹ Abigail Stepnitz, former coordinator of the Poppy Project, a key service provider for trafficked women in the UK, highlighted how soon after the post election conflict in Kenya the number of Kenyan women assisted by the Poppy Project increased considerably.¹⁰

In some cases, traffickers use the pretext of access to protection as a recruitment tactic. Targeting individuals and families desperate to leave their countries in search of protection, they offer access to countries of asylum. However, this is often at the price of, or with the hidden intention of, exploitation. Deception and 'abuse of a position of vulnerability' bring these persons within the trafficking paradigm. This also highlights the links between human trafficking and migrant smuggling.

⁶ Sonja Wolte, *Armed Conflict and Trafficking in Women: Desk Research* (Deutsche Gesellschaft für Technische Zusammenarbeit 2004)

⁷ Yoshimi Yoshiaki, *Comfort Women: Sexual Slavery in the Japanese Military During World War II* (Columbia University Press 2000)

⁸ See generally: United Nations, *Women, Peace and Security* (2002). See also: Dyan Mazurana and others, *From combat to community: Women and girls of Sierra Leone* (Hunt Alternatives Fund 2004)

⁹ See, for instance: Alja Klopčič, 'Trafficking in Human Beings in Transition and Post-Conflict Countries' (2004) 1 Human Security Perspectives 7; Jennifer Murray, 'Who Will Police the Peace-Builders - The Failure to Establish Accountability for the Participation of United Nations Civilian Police in the Trafficking of Women in Post-Conflict Bosnia and Herzegovina' (2003) 34 Columbia Human Rights Law Review 475; Martina E Vandenberg and Kathleen Peratis, 'Hopes betrayed-Trafficking Of Women And Girls To Post-Conflict Bosnia And Herzegovina For Forced Prostitution' (Human Rights Watch, 2002); Randall Akee and others, *Ethnic Fragmentation, Conflict, Displaced Persons and Human Trafficking: an Empirical Analysis* (Emerald Group Publishing Limited 2010); Sandrine Valentine, 'Trafficking of Child Soldiers: Expanding the United Nations Convention on the Rights of the Child and its Optional Protocol on the Involvement of Children in Armed Conflict' (2003) 9 New English Journal of International and Comparative Law 109

¹⁰ Human Rights Europe, *Podcast: Human trafficking in Europe – Myths and facts* (Council of Europe 2013)

Both asylum seekers and traffickers often resort to the services of smugglers in order to acquire entry into the destination country.¹¹ Migrant smuggling overlaps in a variety of practical and legal ways with both human trafficking and asylum. McSherry and Kneebone rightly identify how many trafficked persons may initially begin their journey as smuggled persons and that ‘in practice, smuggling rings and trafficking rings are closely related and both smuggled and trafficked persons may end up being labelled ‘illegal’.¹² Hurdles to entering other countries, and limited opportunities for legal migration, coupled with sustained demand for cross border movement, and inequality between States, will necessarily result in mixed flows of migrants including asylum seekers, trafficked persons, as well as other economic migrants. The legal divide promoted by the Trafficking Protocol and the Migrant Smuggling Protocol is therefore difficult to apply in practice. This is also a reflection of a more nuanced understanding of trafficking that factors in on / in different modes and levels of coercion and exploitation.

Upon arrival in countries of destination or transit, and especially if/when the illegal entry is detected by the immigration authorities, it is not uncommon for persons who have been trafficked to file (or for traffickers to file on their behalf) applications for asylum in order to hinder or postpone their deportation whilst gaining legal access to the labour market. For traffickers, this is a way of ‘protecting their investment’ ensuring that the intended income is not disrupted by untimely deportation. A case prosecuted in the Netherlands but which required the extradition of the accused from Ireland exemplifies this. Before the Irish Courts the

¹¹ See for example: The Human Smuggling and Trafficking Center; Fact Sheet: Distinctions between Migrant Smuggling and Human Trafficking (The Human Smuggling and Trafficking Center 2006)

¹² Bernadette McSherry and Susan Kneebone, ‘Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights’ (2009) 12 International Journal of Human Rights 67

Dutch Government explained how the accused would arrange for girls to travel from Nigeria to the Netherlands. They would then seek asylum and as minors they would be put into the care of a guardian at which point the accused would make arrangements for these same girls to abscond, ending up in the Spanish and Italian sex industry. The application for asylum was a critical way of ensuring that the girls would remain in Europe.

The asylum system can also support the identification of trafficked persons. Status determination bodies have a unique opportunity of long interviews with individuals where questions about the journey and reasons for flight are not only accepted but also expected. This in turn provides opportunities towards the identification of trafficked persons. It is in acknowledgement of this real potential that the UNHCR and various national authorities have developed guidelines for its status determination officers on how to handle cases of trafficking.¹³ Intense coaching by their traffickers, threats to self and family, as well as a general hope that the dreams that led to the initial decision to migrate were still coming to fruition may hinder this potential. Moreover, in many cases, the trafficking process would not have yet reached the stage of exploitation meaning that the individual might not yet be aware that he/she has been deceived into something which was not as he/she initially intended.

Furthermore, the process of seeking asylum may also serve as an awareness raising process with trafficked persons about the process and reality of exploitation. It may assist trafficked persons in realising whom the traffickers and their associates are in practice, including by tracing the process of trafficking to its roots. This in turn

¹³ See: Anne Marie Gallagher and Maria Riiskjær, *Review of UNHCR's Efforts to Prevent and Respond to Human Trafficking* (UNHCR 2008)

highlights the importance that refugee status determination bodies, asylum lawyers and other support workers are well aware of the various possibilities and indicators in order to ensure that trafficked persons are identified and referred to and through the relevant channels. As Bhabha and Alfirev accurately note: 'since trafficked persons rarely identify themselves, specialist expertise is required to ask the right questions and draw the right conclusions from the evidence available'.¹⁴

Refugees and other persons in need of protection are also vulnerable to trafficking.¹⁵ Kneebone reflects on the emerging evidence of this vulnerability,¹⁶ whilst the UNHCR acknowledges that 'displacement and vulnerability linked to persecution, conflicts and involuntary displacement put refugees and internally displaced persons at greater risk of exploitation and abuse'.¹⁷ The 2003 Agenda for Protection highlights the experiences of refugee women and children and risks of trafficking as a security related concern noting how:

All too often, refugee women endure rape, abduction and trafficking at the hands of fellow refugees, host communities, local authorities or humanitarian workers. Refugees, especially girls, are frequently subjected to sexual exploitation, violence and abuse. Armed groups and national armed forces frequently target refugee children and adolescents for forcible military recruitment.¹⁸

The 2011 Age, Gender and Diversity policy identifies how the roles of men and boys changes in the context of displacement with boys in particular being 'at high risk of

¹⁴ Jacqueline Bhabha and Christina Alfirev, *The Identification and Referral of Trafficked Persons to Procedures for Determining International Protection Needs* (Legal and Protection Policy Research Series, 2009)

¹⁵ Whilst this research is focused on trafficked persons as refugees, it is important to also identify, albeit briefly, the other side of the coin, that is the vulnerability of refugees to human trafficking.

¹⁶ See Kneebone 'The Refugee-Trafficking Nexus' (n 3)

¹⁷ UNHCR, *Combatting Human Trafficking: Overview of UNHCR Anti-Trafficking Activities in Europe* (UNHCR 2005) 1

¹⁸ UNHCR, *Agenda for Protection 2003* (UNHCR 2003) 14

trafficking, forced recruitment and sexual and other forms of violence'.¹⁹ Elsewhere UNHCR reports how, for instance, Bhutanese refugee women are trafficked to India and Nepal whilst Burmese refugees from UNHCR camps are trafficked internally within Thailand.²⁰ The United States Trafficking in Persons Report identifies refugees as particularly vulnerable to trafficking, with a special focus on a number of countries including Malaysia and Egypt.²¹ Similar concerns are raised by UNODC whilst IOM has identified female headed Iraqi refugee families in Syria as being particularly susceptible.²² The Coalition for Organ Failure Solutions collected evidence that indicates that organ traffickers have exploited and are continuing to exploit Sudanese refugees and asylum-seekers in Egypt.²³ The often-vulnerable legal situation of trafficked persons renders reporting of such instances even less likely.

The reasons for this vulnerability vary. Refugees and asylum seekers are specifically preyed upon by traffickers looking for relatively easy targets. The stories coming out of the Zhataari camp for Syrian refugees reflect but one instance of such targeting.²⁴

Moreover, refugees also sometimes lack legal protection or awareness of protection, and are often excluded or considered and treated as second-class citizens. Refugee smugglers have been known to sell their clients into exploitation.²⁵

¹⁹ UNHCR, *UNHCR Age, Gender and Diversity Policy: Working with _People and Communities for Equality and Protection* (UNHCR 2011) para 18.

²⁰ Gallagher and Riiskjær (n 12) 13

²¹ US Department of State, *Trafficking in Person Report 2010*, available at: <http://www.state.gov/documents/organisation/142979.pdf> [last accessed: 5 October 2013]

²² <http://www.iom.int/jahia/Jahia/media/press-briefing-notes/pbnAF/cache/offonce?entryId=26785> [last accessed: 5 October 2013]

²³ Coalition for Organ-Failure Solutions, *Sudanese Victims of Organized Trafficking in Egypt: A Preliminary Evidence-Based Victim Centered Report* (Coalition for Organ-Failure Solutions 2011)

²⁴ See for instance: <http://www.bbc.co.uk/news/world-middle-east-22473573> [last accessed: 5 October 2013]

²⁵ See for instance: Mirjam Van Reisen and others, *Human Trafficking in the Sinai: Refugees between Life and Death* (Wolf Legal Publishers 2012); Karen Jacobsen, Sara Robinson and Laurie Lijnders, 'Ransom, Collaborators, Corruption: Sinai Trafficking and Transnational Networks' (Tufts University 2013)

They are often displaced from their usual support networks and are socially, economically and politically marginalised. Language, social and cultural barriers can reduce refugees' ability to avoid tricks aimed at luring them into exploitative situations. Moreover destitution often drives people to accept offers of work in the hope that they'll turn out be legitimate.²⁶ Refugees often complain that an inability to find work that leads to pressures from home often leads them into doubtful and risky transactions. This might include employment under exploitative conditions as well as engaging in illegal activities. Kara notes that 'perhaps the most effective location for the use of deceit in recruiting slaves is in refugee camps'.²⁷ Research by the Immigrant Council of Ireland found how: 'accounts given by clients of the ICI indicate traffickers have used the asylum system for residency and accommodation whilst simultaneously trafficking victims'.²⁸

However refugees and other protected persons are not only victims of trafficking. In some cases they are also perpetrators, whether in their own name or within the framework and under the control of others. IOM research in South Africa, for instance, noted how some male refugees trafficked female relations from their countries of origins as a survival technique.²⁹ Moreover, UNHCR reports how its Nepal office suspects that traffickers use refugees residing in refugee camp as recruiters. In some cases, therefore, asylum seeker communities might host both

²⁶ http://humantrafficking.change.org/blog/view/when_refugees_become_slaves_in_a_strange_land

²⁷ For instance, Kara discusses how refugee camps offer the most effective location for the use of deceit for the recruitment of slaves. Whilst the risks are often known, refugees stuck in refugee camps often feel they do not have a choice. She notes how 'because the refugees were trapped, slave traders who offered job opportunities met with high success rates in acquiring new slaves. Every refugee I met knew the risks, but like the desperate citizens of Moldova, they felt they had no choice'. See: Sidharth Kara, *Sex Trafficking: Inside the Business of Modern Slavery* (Columbia University Press 2009)

²⁸ Immigrant Council of Ireland, *Asylum Seeking Victims of Human Trafficking in Ireland: Legal and Practical Challenges* (Immigrant Council of Ireland 2011) 7

²⁹ International Organisation for Migration, *The Trafficking of Women and Children in the Southern African Region: Presentation of Research* (International Organisation for Migration 2003)

traffickers and trafficked persons further highlighting the need for efforts aimed at the identification of trafficking within the asylum seeking community.

Moreover, asylum offers a viable channel for the long-term protection of trafficked persons. This being the focus of the present research we now turn to an assessment of why such protection at the interstices of international refugee law is required for trafficked persons, despite the existence of counter-trafficking instruments that expressly state the protection of trafficked persons as one of their purposes. This possible overlap is recognised in the anti-trafficking instruments, including Article 14(1) of the Trafficking Protocol, Article 40(4) of the COE Convention and Article 11(6) and the Preamble of the EU Anti-Trafficking Directive.

Part 2: Why Trafficked Persons Need Asylum

Recent years have seen a growing number of trafficked persons turning to refugee law in search of protection. This chapter assesses the relevance of asylum as a channel for long-term protection within a context of counter-trafficking instruments claiming to perform this function. This relevance is explained in at least two ways. Firstly, it is evidenced from the growing number of asylum applications filed by trafficked persons.³⁰ Secondly, an assessment of the protection potential of the current anti-trafficking instruments indicates a need for alternatives, and asylum is one of them. This is the focus to which we now turn.

³⁰ See in this regard: Abigail Stepnitz, 'A Lie More Disastrous Than The Truth: Asylum and the Identification of Trafficked Women in the UK.' (2012) 1 Anti-Trafficking Review 104; Stepnitz notes that based on Poppy Project service users (women trafficked for forced prostitution – i.e. only one subset of trafficked persons) 792 individuals had sought asylum in the period between 1 April 2009 and 31 March 2011

The scope of this analysis is limited first by the legal instruments to which it refers and second by the type of protection it addresses. Whilst a wide spectrum of legal instruments provide for the prohibition of human trafficking,³¹ this chapter focuses on those instruments which are specifically dedicated to trafficking and which make substantive provisions. These are: the Trafficking Protocol, the CoE Trafficking Convention, the SAARC Trafficking Convention, the EU Anti-Trafficking Directive and the Residence Permit Directive. National transposition and implementation of the provisions, as well as provisions in international legal instruments around slavery, are beyond the scope of the present chapter and will only be referred to in passing. This focus is merited in that substantive protection provisions are incorporated therein and not in the broader instruments which, whilst establishing the principle that trafficking is prohibited, do not otherwise provide further legal obligations.

Whilst acknowledging that a ‘rights based approach’ to counter-trafficking is multi-pronged and comprises not only protection provisions, but also issues of prevention, criminalisation, investigation, prosecution and punishment,³² this chapter focuses exclusively on the *protection potential* of the existing instruments within a human rights framework. It therefore looks both at how risks are addressed and mitigated and at the issue of the status of trafficked persons in receiving States addressing, in particular, the right of trafficked persons to stay in the country of destination. This, it is argued, is where the greatest weakness of the current framework lies. It does not address the criminal justice dimensions of the relevant instruments in any depth.

³¹ See in this regard: Chapter 1, Part 3 – Legal Mapping

³² See in this regard: Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (Martinus Nijhoff Publishing 2006); UNODC, *Toolkit to Combat Trafficking in Persons* (United Nations 2008); McSherry and Kneebone (n 11)

Furthermore, the focus of this chapter will be on ‘long term protection’ rather than short term ‘assistance and support’. The latter receive considerably greater attention in the anti-trafficking instruments but are less relevant to a discussion on long-term protection, including immigration status which refugee law seeks to provide. Long-term protection includes protection from potential harm in the long term, not only provisions of assistance upon identification as a trafficked person. Long-term protection includes immigration status, as well as access to long-term care, access to employment, education and healthcare, and, more broadly, an ability to settle into a new life free from the risk of harm. It goes beyond the short term support provided through a single session with a counsellor and social worker, and explores the need for settlement and integration. As such the chapter deals primarily with the rights of trafficked persons in, and the obligations of destination States, that is, the country to which they have been trafficked. As will be outlined here, asylum also creates obligations on third countries irrespective of whether they have played a part in the trafficking experience.

2.2.1 Protection Provisions in the Existing Counter-Trafficking Instruments

A number of factors will influence the decision of trafficked persons regarding return to their countries of origin. These factors may be of such kind or severity to call into play international human rights law and, in some cases, to activate *non-refoulement* obligations. These include the possibility of re-trafficking (whether by the same or other traffickers), the threat of retaliation (by traffickers and/or their associates – and possibly the state) and the risk of ostracism (by family and more broadly by

society).³³ Other reasons may include family and social ties having been established in the country of destination that might call into play the right to family life, health considerations, as well as other human rights obligations. This section provides a critical analysis of how the existing counter-trafficking instruments address these concerns by providing an overview of some of the recent critiques, by applying an assessment framework to determine the protection potential of the instruments and by assessing these instruments against the standards set out in the OHCHR Principles and Guidelines on Human Rights and Human Trafficking.³⁴

2.2.2 Recent Critiques

Recent literature on the existing counter-trafficking instruments makes two related observations. First, that these instruments promote a law enforcement approach to human trafficking; second, that this is done to the detriment of protection-guarantees for trafficked persons. Hathaway,³⁵ Srikantiah,³⁶ Bruch³⁷ and Fitzpatrick³⁸ agree that the primary focus of the Protocol is on law enforcement, including prevention and prosecution understood within a framework of border control and transnational crime. Gallagher notes that while human rights concerns may have provided some impetus (or cover) for collective action, it is the sovereignty/security

³³ See in this regard: Nadine Finch and Parosha Chandran, 'Residence for Victims of Trafficking in the UK: Humanitarian, Asylum and Human Rights Considerations' in Parosha Chandran (ed), *Human Trafficking Handbook: Recognising Trafficking and Modern-Day Slavery in the UK* (LexisNexis 2011) 243

³⁴ OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (United Nations 2010)

³⁵ James Hathaway, 'The Human Rights Quagmire of Human Trafficking' (2008) 49 *Virginia Journal of International Law* 1

³⁶ Jayashri Srikantiah, 'Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law' (2007) 28 *Immigration and Nationality Law Review* 741

³⁷ Elizabeth M. Bruch, 'Models Wanted: The Search for an Effective Response to Human Trafficking' (2004) 40 *Stanford Journal of International Law* 1

³⁸ Joan Fitzpatrick, 'Trafficking and a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking' (2003) 24 *Michigan Journal of International Law* 1143

issues surrounding trafficking and migrant smuggling that were the true driving force behind such efforts.³⁹ This is partly explained by the adoption of the Protocol within the purview of the United Nations Office on Drugs and Crime, a context that raised the concern of the Special Rapporteur on Violence against Women.⁴⁰ According to Edwards,⁴¹ this focus reflects how ‘national governments have tended to approach trafficking in human beings principally from a criminal justice / prosecution or an immigration perspective, the latter in vigorous and increasing attempts to control irregular migration’.⁴² In practice, this focus resulted in a Protocol that ‘from a victims’ perspective (...) offers only limited assistance with rather nebulous, aspirational obligations that leave much to the State’s discretion’.⁴³ Kneebone eloquently sums up the argument:

CTOC leads to a criminal justice response in which trafficked persons are constructed by police and law in contradictory terms, both as free agents (migrants) and as victims of crime, as a result of the failure to see them as objects of responsibility and bearers of human rights.⁴⁴

The European Union framework has been criticised for being overly focused on prosecution and providing protection only to those who are able and willing to participate in the prosecution of traffickers. Whilst the UN Joint Commentary notes that the adoption of the 2011 Anti-Trafficking Directive reflects the continued

³⁹ Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 976

⁴⁰ Radhika Coomaraswamy, *Integration of the Human Rights of Women and the Gender Perspective: Report of the Special Rapporteur on Violence Against Women submitted in accordance with Commission on Human Rights Resolution 1997/44* (2000). On this point however, Gallagher rightly notes that ‘the international human rights system amply demonstrated over many years that, on its own, it was incapable of taking any serious steps towards (the) elimination trafficking and other forms of private exploitation’ Gallagher, *‘International Law of Human Trafficking’* (n 35) 5

⁴¹ Alice Edwards, ‘Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor’ (2007) 36 *Denver Journal of International Law and Policy* 9

⁴² *Ibid* 11

⁴³ Ryszard Piotrowicz, ‘The UNHCR’s Guidelines on Human Trafficking’ (2008) 20 *International Journal of Refugee Law* 242

⁴⁴ Kneebone, ‘The Refugee–Trafficking Nexus: Making Good (The) Connections’ (n 3)

commitment of the European Union to counter-trafficking, and represents a critical step in addressing human trafficking comprehensively, it still / nonetheless raises a number of concerns regarding who the object of protection might be. Commenting about the 2004 Residence Permit Directive (which remains valid despite the adoption of the 2011 Anti-Trafficking Directive and reference to which is made in the latter directive) both Raffaelli⁴⁵ and Piotrowicz⁴⁶ note that the narrow protection offered by European law hinders its potential effectiveness.⁴⁷ As will be highlighted below, whilst the 2011 Anti-Trafficking Directive remedies some of the shortfalls, it does not overcome the key hurdle that protection is limited to persons collaborating with the prosecution of the traffickers.

The Council of Europe Anti-Trafficking Convention received greater support by academic writers. Gallagher⁴⁸ and Sembacher⁴⁹ laud its human rights dimension going so far as to refer to it as a human rights treaty and a milestone towards achieving a comprehensive approach. This optimism is justified by the specific, detailed and substantive human rights provisions found in the Convention. Gallagher expresses some caution rightly noting that the Convention represents a marked improvement over the Protocol, but still falls short of the higher standards set out by the OHCHR Guiding Principles.⁵⁰ As the Explanatory Report identifies, the drafters of the Convention recognised the links between the prosecution of traffickers and

⁴⁵ Rosa Raffaelli, 'The European Approach to the Protection of Trafficking Victims' (2009) 10 German Law Journal 205

⁴⁶ Ryszard Piotrowicz, 'European Initiatives in the Protection of Victims of Trafficking who give Evidence Against their Traffickers' (2002) 14 International Journal of Refugee Law 263

⁴⁷ Raffaelli (n 41) 1

⁴⁸ Gallagher, *The International Law of Human Trafficking* (n 35); Anne Gallagher, 'Recent legal developments in the field of human trafficking: A critical review of the 2005 European Convention and related instruments' (2006) 8 European Journal of Migration and Law 163

⁴⁹ Anke Sembacher, 'The Council of Europe Convention on Action against Trafficking in Human Beings' (2006) 14 Tulane Journal of International and Comparative Law 435

⁵⁰ OHCHR (n 30)

the protection of trafficked persons.⁵¹ Scarpa eloquently argues that one of the critical achievements of the Convention is:

The shift of focus from the traffickers' prosecution to the victims' protection and the consequent adoption of a human rights based approach, of gender mainstreaming and of a child-sensitive approach as the basis of every action in the field of trafficking in persons.

Scarpa, however, also acknowledges that various protection oriented provisions proposed by the Parliamentary Assembly were not accepted, a failure she attributes in part to the pressure by the European Union representatives in the drafting committee.⁵²

The SAARC Convention has been described as primarily a criminal justice instrument that replicates the moralistic and protectionist emphasis of the 1949 Trafficking Convention. Gallagher acknowledges that the Convention nevertheless includes a number of important assistance and protection provisions, several of which go beyond their strictly optional equivalents contained in the Protocol.⁵³ However, the scope of the SAARC Convention is narrower than other instruments, referring exclusively to the trafficking of women and girls for the purposes of sexual exploitation, and thereby excluding trafficking for other exploitative purposes as well as the trafficking of men and boys. This must be borne in mind when reading comments specific to this particular instrument.

⁵¹ Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings* (2005)

⁵² Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (Oxford University Press 2008) 145

⁵³ Gallagher, *The International Law of Human Trafficking* (n 35) 131

2.2.3 Assessing the Protection Potential

We now move into assessing the (human rights) protection potential of the international instruments on trafficking of human beings. The analytical framework applied here builds on that developed by UNESCO within the context of education that refers to: availability, accessibility, acceptability and adaptability taking a context specific understanding of the terms.⁵⁴ For our purposes ‘availability’ refers to whether or not there is a legal obligation to make protection provisions. As such it refers to whether protection is a priority of the legal instruments and whether there is a legal obligation to protect. The discussion around ‘accessibility’ includes practical considerations and legal constraints on accessing protection, primarily conditionality of protection on collaboration with law enforcement. The assessment of ‘acceptability’ looks at the content of the protection granted and whether this is in line with other international obligations and whether it meets the needs of trafficked persons. ‘Adaptability’ is not addressed directly in this chapter and is instead replaced by a brief discussion of potential human rights externalities. Throughout this analysis, the viability of asylum as a channel for protecting trafficked persons is discussed, outlining whether and how asylum overcomes some of the shortcomings identified in trafficking specific protection provisions.

2.2.3.1 Availability: Stated Purpose, Nature of Provisions, Scope of Protection

There are at least three dimensions to the question of availability of protection within the trafficking instruments: the first is whether protection is one of the

⁵⁴ See generally: Katarina Tomaševski, *Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable*. (United Nations 2001)

purposes of the legal instruments; the second relates to the nature of the legal provisions, and the third refers to the scope of protection.

With regard to stated purpose, the OHCHR Guidelines promote the primacy of human rights as an underlying purpose and feature of all counter-trafficking efforts.⁵⁵ The achievement of a comprehensive approach⁵⁶ and specifically the protection and human rights of trafficked persons is a stated purpose of the Protocol,⁵⁷ the Council of Europe Convention⁵⁸ and the 2011 EU Directive.⁵⁹ The SAARC Convention places cooperation towards the rehabilitation of trafficked persons as one of the purposes.⁶⁰ Such statements of purpose carry political rather than legal weight, and whilst providing interpretive assistance regarding the remaining provisions of the instruments, they do not themselves create legal requirements. The importance of protection is also reflected in the preambular clauses of all of these instruments, albeit to different degrees.

⁵⁵ Recommendation 1, within the broader section on Primacy of Human Rights provides that: 'The human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims'

⁵⁶ Such an approach is usually described in relation to: Prevention, Prosecution, Protection and Redress

⁵⁷ The preamble to the Protocol refers to how 'effective action to prevent and combat trafficking in persons, (...), requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognised human rights'. Article 2 provides that one of the purposes of the Protocol is 'to protect and assist the victims of such trafficking, with full respect to their human rights'

⁵⁸ Article 1(1)B provides that one of the purposes of the Convention is 'to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, whilst guaranteeing gender equality (...)'

⁵⁹ In describing the subject matter of the Directive, Article 1 provides that 'This Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of trafficking in human beings. It also introduces common provisions, taking into account the gender perspective, to strengthen the prevention of this crime and the protection of the victims thereof.' This is further developed through a number of preamble clauses which place specific focus on the protection of trafficked persons

⁶⁰ Article II of the Convention provides that The purpose of this Convention is to promote cooperation amongst Member States so that they may effectively deal with the various aspects of prevention, interdiction and suppression of trafficking in women and children; the repatriation and rehabilitation of victims of trafficking and prevent the use of women and children in international prostitution networks, particularly where the countries of the SAARC region are the countries of origin, transit and destination

On the other hand ‘protection’ is the *sine qua non* of asylum. Whilst a discussion on the purpose of asylum is beyond the scope of the present analysis, it suffices to briefly refer to the broad humanitarian objective of the Refugee Convention⁶¹ and the conceptualisation of asylum as offering surrogate human rights’ protection when the State of origin proves unable or unwilling to meet its protection obligations. Comparing trafficking instruments and asylum in this context is of course difficult as one is contrasting the protection objectives of asylum with the crime-control objectives inherent in anti-trafficking instruments.

Of greater relevance is the nature of the relevant provisions – namely whether the provisions are mandatory (shall) or discretionary (may) and how these compare to other provisions within the same instrument. In the latter case, the protection potential of the provisions, and the relevant instrument more broadly, is significantly more limited. This is relevant due to the consensual theory of international legal obligations whereby States are only bound if they have agreed to be bound.⁶²

Part II of the Protocol deals specifically with protection issues. The provisions therein are drafted in discretionary, non-obligatory terms. They refer to ‘shall consider implementing’ and ‘shall endeavour to provide’ justifying the criticism echoed by Hathaway,⁶³ Gallagher,⁶⁴ McClean⁶⁵ and Fitzpatrick⁶⁶ amongst others that the

⁶¹ See generally: *Zainab Esther Fornah v. Secretary of State for the Home Department*, [2005] EWCA Civ 680, United Kingdom: Court of Appeal (England and Wales)

⁶² Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge 2002)

⁶³ Hathaway, ‘The Human Rights Quagmire of Human Trafficking’ (n 31)

⁶⁴ Gallagher, *The international law of human trafficking* (n 35); A. Gallagher, ‘Human Rights and The New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’ (2001) 23 Human Rights Quarterly 975; Anne Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway’ (2009) 49 Virginia Journal of International Law 789

⁶⁵ David McClean, *Transnational Organized Crime* (Oxford University Press 2007)

⁶⁶ Fitzpatrick (n 34)

Protocol is 'content to recommend, rather than to require remedies for victims'.⁶⁷

The inter-agency group⁶⁸ noted that the discretionary nature of the protection provisions was 'unnecessarily restrictive and not in accordance with international human rights law'.⁶⁹ A number of obligations are imposed, relating to compensation, privacy and assistance with proceedings. However, even these provisions are qualified mainly by an unfettered reference to 'appropriate cases', allowing a wide margin of State discretion. The protection potential of the Protocol is therefore undermined by the lack of legal obligations and the reliance on provisions that, as Jayasinghe and Baglay⁷⁰ rightly note, 'could be characterised as requiring States to perform acts of benevolence'.⁷¹ The weak protection potential is further highlighted when comparing the discretionary nature of these provisions to the mandatory nature of provisions on: criminalisation,⁷² repatriation,⁷³ prevention,⁷⁴ information exchange and training,⁷⁵ and border measures.⁷⁶ Nowhere is this contrast starker than in the discussion on return. Whilst the return provisions (dealing with cooperation on return) are all mandatory in nature, the requirement relating to the voluntary nature of such return is couched as: 'and should preferably be

⁶⁷ Hathaway, 'The Human Rights Quagmire of Human Trafficking' (n 31) 7

⁶⁸ As reported by Anne Gallagher, 'Human rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 Human Rights Quarterly 975

⁶⁹ Ibid

⁷⁰ Udara Jayasinghe and Sasha Baglay, 'Protecting Victims of Human Trafficking Within a 'Non-Refoulement' Framework: is Complementary Protection an Effective Alternative in Canada and Australia?' (2011) 23 International Journal of Refugee Law 489

⁷¹ Ibid

⁷² Article 5

⁷³ Article 8

⁷⁴ Article 9

⁷⁵ Article 10

⁷⁶ Article 11

voluntary'.⁷⁷ The *travaux préparatoires* explicitly explain that this does not place any obligations on the State Party returning the victims.⁷⁸

Other instruments have sought to provide more mandatory provisions. For instance, the EU framework is particularly strong as a result of the enforcement possibilities inherent in an instrument of EU Law.⁷⁹ Whilst some discretion might still be applied (including definitional issues and context specific determinations) States are obliged to adopt the proposed measures and face infringement procedures for failure to do so. This is an important improvement over the weak provisions enshrined in the Protocol. The protection provisions in the international framework (beyond the European context) continues to be framed in soft obligations reflecting lack of political will to transform rhetoric into legal requirements against which States may be held accountable.

The issue of the nature of provisions is clearer in the context of refugee law. The Geneva Refugee Convention is drafted in mandatory terms, as are the various regional instruments. It must be noted however that the regional refugee law instruments do not all carry the same legal strength, having been adopted through different international organisations enjoying different levels of harmonization and law making competence.⁸⁰ The Cartagena Declaration is possibly the weakest in

⁷⁷ Article 8(2)

⁷⁸ See: McClean (n 61)

⁷⁹ See generally: Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press 2011)

⁸⁰ A detailed elaboration of the specific characteristics of each legal vehicle is beyond the scope of the present thesis. It is however pertinent to briefly outline the instruments adopted by region as this has implications on the strength of the specific instruments and their potential influence on national legislation. The universal instrument is a Convention meaning that it is legally binding on States that choose to sign and ratify it. It is supplemented by a Protocol that is subject to independent ratification. The same applies for the Arab Convention and the OAU Convention. The Latin American model is a declaration, a non legally binding statement of aspiration. Interestingly, the declaration emanated from a conference which brought together State representatives and academics and not from within the Organisation of American States. Nevertheless, the latter has adopted the

terms of the nature of the instrument even if it is held to be widely influential in asylum law and policy in Latin America.⁸¹

Asylum expands the availability of protection both in terms of which States would be responsible for its provision and with regard to who might be entitled thereto. With regard to the geographical scope, the obligations under the trafficking instruments refer, explicitly or implicitly, to countries of origin, transit and destination as reflected in the preamble to the Protocol.⁸² Asylum on the other hand also places obligations on third countries, that is, countries with no connection to the trafficking process. For instance, if a Nigerian girl is trafficked through Italy and exploited in Spain and manages to reach the United Kingdom, the UK is still obliged to examine her claim for asylum even if this claim is based exclusively on risks associated with her having been trafficked. This is also relevant in cases of internal trafficking. Applications by persons who have been trafficked into the same country where protection is sought are relatively new to refugee law and place trafficking based asylum claims as a subset of their own.

Moreover, asylum extends the scope of protection beyond trafficked persons themselves and can also be used to protect persons at risk of being trafficked.

Discursively this is reflected in the title of the UNHCR Guidelines on trafficking which

declaration in its General Assembly. The 'Asian' instrument is also not legally binding, having been adopted by the Asian - African Legal Consultative Organisation that does not have competence to promulgate legally binding instruments. The EU's instrument within this field is the Directive, an instrument that is legally binding as to the ends to be achieved but allows Member States a certain degree of discretion as to the form and method to be adopted in achieving them. The choice of instrument reflects the will (or lack of it) of States to bind themselves to certain legal obligations. It also reflects the strength of the entity adopting the instruments. This notwithstanding, implementation and application remain within the competence and responsibility of individual States. For instance, whilst declarations are not legally binding, the Cartagena Declaration is applied widely across Latin America. In the EU, research has shown widely diverging application of the relevant definitions

⁸¹ See: BS Chimni, *International Refugee Law* (Sage 2000)

⁸² As noted above, the preamble makes reference to a 'comprehensive international approach' as including measures in countries of origin, transit and destination

claims which refer to victims of human trafficking and those at risk of being trafficked.⁸³ Such risk ranges from those who have already suffered attempts and threats of trafficking to those whose circumstances place them at heightened risk of being targeted and trafficked. Various cases assessed in the course of this research stood somewhere on this spectrum of persons who had trafficking related claims but who had not been trafficked and could therefore not be considered 'former victims of human trafficking'. This issue is one to which we return later when discussing the Convention ground nexus requirement and the progressive developments in that regard.

Asylum also covers other persons including: family members and other known associates of the trafficked persons who might be at risk. In one of the analysed cases, for instance, one of the claims (the case dealt with two claims concurrently) was that of the husband of a trafficked person who considered himself at risk by the traffickers for helping her escape. It can also be used to protect activists and other stakeholders who might face retribution from traffickers because of their anti-trafficking efforts.⁸⁴ One case dealt with the protection claims of a formal school principal who felt threatened because of her actions to combat the trafficking of girls attending her school. Similarly the New Zealand Refugee Appeal Nos 76481-76481 revolved around the engagement of one of the applicants (the husband) in anti-trafficking activities in Pakistan. Each applicant must, however, prove a well-founded fear because of a Convention ground, although the familial or other

⁸³ UNHCR, 'The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked' in *Guidelines on International Protection* (UNHCR 2006)

⁸⁴ For an example of risks faced see: Martina Vandenberg, 'Complicity, Corruption, and Human Rights: Trafficking in Human Beings' 34 Case W Res J Int'l L 323 9. For a case see: Cases 76478-76481 of the Refugee Status Appeals Authority of New Zealand. See also: *Suvorova v. Canada* (Minister of Citizenship and Immigration) of the Canadian Federal Court

relationship with a trafficked person might itself constitute a valid link. This increases both the availability and accessibility of protection, thereby supporting the view that asylum is a viable source of protection for trafficked persons.

Finally, the implication of the trafficking instruments is that protection, wherever addressed, is against traffickers and their associates. Asylum, on the other hand, offers protection against all forms of harm experienced by trafficked persons provided they are of such severity as would amount to persecution. As will be seen in Chapter 4 on persecution, ostracism by family and/or the community is a key form of persecution raised in trafficking based asylum claims. Such harm appears to fall outside the protection provisions of the trafficking instruments but might be sufficient for a successful claim for asylum. This is an important consideration considering the harm that may ensue from such ostracism, including significant physical and psychological harm as well as the heightened risk of re-trafficking that such ostracism causes.

2.2.3.2 Accessibility: Conditionality and Practical Barriers

The issues of ‘availability’ of protection cannot be divorced from the discussion on the ‘accessibility’ of protection. Two dimensions are addressed here: the issue of conditionality and the issue of practical barriers to accessing protection. Gallagher observes that the linking of assistance and protection to cooperation with national criminal justice agencies is prevalent in all regions of the world.⁸⁵ This is despite a growing acknowledgment that this cooperation is likely to increase the risks faced by trafficked persons⁸⁶ and that conditionality negatively on the trafficked persons’

⁸⁵ Gallagher, *The International Law of Human Trafficking* (n 35) 298

⁸⁶ See: Vandenberg, ‘Complicity, Corruption, and Human Rights: Trafficking in Human Beings’ (n 80)

perception of law enforcement, thereby hindering rather than helping prosecutions.⁸⁷ The OHCHR Guidelines provide that protection and care should be unconditional on the capacity or willingness to partake in legal proceedings.⁸⁸ The protection potential of a legal instrument is therefore negatively affected by making protection and support conditional on collaboration.

Conditionality of protection is most direct in the 2004 European Union Directive on the residence permit issued to third country nationals who are victims of trafficking in human beings (...) who cooperate with the competent authorities. As the full name suggests, the Directive is conditional on cooperation with the authorities in its entirety. Whilst cooperation goes undefined in the Directive, it is broadly understood as referring to the giving of information related to arrival as a trafficked person including the name of traffickers and their accomplices or details related to points of departure, which information significantly contributes to the tracing or prosecution of the trafficker.⁸⁹ Cooperation, therefore, is broader than a decision to act as a witness in a trial, but must contribute and be beneficial to the investigation and/or prosecution. The conditionality is linked both to the granting of the residence permit (and related rights) and to its duration, as the residence permits are renewable only for such time as the cooperation continues.⁹⁰

The 2011 Directive is often wrongly presented as providing for unconditional access to assistance and support.⁹¹ However, through its link to the 2004 Directive,⁹² in

⁸⁷ Mike Dottridge, *Report on the Implementation of Anti-Trafficking Policies and Intervention in the 27 EU Member States from a Human Rights Perspective (2008-2009)* (E-NOTES 2011)

⁸⁸ OHCHR Guidelines (n 30) Para 8

⁸⁹ See for instance: Article 248A of the Maltese Criminal Code

⁹⁰ Article 8(3)

⁹¹ See for instance: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organised-crime-and-human-trafficking/trafficking-in-human-beings/index_en.htm [Last accessed: 5 October 2013]

practice it also imposes a condition of cooperation with the authorities, at least with regard to trafficked persons who do not have rights to legal residence.⁹³ In practice, with regard to this subset of trafficked persons, assistance and support are unconditional only until the deportation, the barring of which is conditional on collaboration. Moreover, issues of protection are addressed within the purview of the criminal justice process, restricting their scope to those trafficked persons somehow involved in that process (as witnesses or in some other capacity). As noted above, the focus here is on protection rather than assistance and support, although the two must go hand in hand.

Similarly, the Council of Europe Convention's provisions regarding assistance provide that such support and assistance should not be made conditional on the willingness of the trafficked person to act as a witness. The direct reference to acting as a witness implies that assistance can, within the parameters of the Convention, be made conditional on forms of cooperation that fall short of acting as a witness. This sceptical interpretation is further merited when considering that in other contexts the Convention speaks of cooperation rather than acting as a witness. With regard to residence permits, the Convention allows States the discretion to determine whether such a permit should be made available to anyone who needs it on the basis of personal circumstances or restrict it to situations where 'the competent

⁹² Article 11(3) provides that: Member States shall take the necessary measures to ensure that assistance and support for a victim are not made conditional on the victim's willingness to cooperate in the criminal investigation, prosecution or trial, without prejudice to Directive 2004/81/EC of 29 April 2004 on the Residence Permit Issued to Third-Country Nationals Who are Victims of Trafficking in Human Beings or Who Have Been the Subject of an Action to Facilitate Illegal Immigration, Who Cooperate With the Competent Authorities or similar national rules

⁹³ For example – this will not be an issue with trafficked persons who are EU nationals and who, as such, have the right to reside in any EU Member State

authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigations or criminal proceedings.’⁹⁴

The Protocol allows an implied right to make assistance and protection conditional on cooperation based on the nature of the provisions – in practice if States are not obliged to offer protection, they are also not obliged to offer unconditional protection. It also provides that repatriation should be with due regard to the safety of the person however it is unclear what the implications of this provision are.

It is to be noted that whilst conditionality remains an intrinsic part of the protection regime within the legal instruments object of this analysis, a number of soft law instruments have clearly sought to restrict such conditionality, arguing instead for unconditional support and protection. These include the OHCHR Guidelines, the UNODC Legislative Guide⁹⁵ as well as the Explanatory Memorandum to the COE Convention. This is another example of soft law moving forward from the basis provided under treaty law. The impact of such recommendations is, however, limited. In practice, and across many countries, these visas or equivalent measures remain under-used. Importantly, they cannot be applied for but rather must be offered by the authorities on a discretionary (often arbitrary) basis. This arbitrariness is encouraged by the failure to adequately outline the relevant test for contribution to the criminal justice process.

Conversely, asylum is not conditional on the criminal justice process but is rather concerned with the risk of harm in the country of origin. As such it marks a shift in

⁹⁴ Article 14(1)

⁹⁵ UNODC, Legislative Guide for the implementation of the Protocol to Prevent, Suppress and Punish Trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organised Crime (United Nations 2004) para. 62

conditionality from the interests of the State and of the prosecution, to the human rights of the individual applicant. For recognition as a refugee, the risk must create a well-founded fear and the harm must reach the level of persecution under one of the five grounds of Article 1A(2) of the Convention. For complementary forms of protection, the risk level may be lower but in either case must involve a substantial violation of human rights. Different States apply different interpretations of the refugee definition and apply different criteria. This shift of conditionality therefore overcomes the accessibility issues raised with regard to the protection under the trafficking instruments.

Asylum protects trafficked persons and persons at risk of trafficking related harms from a future risk and whilst past persecution is an important consideration it is not a *sine qua non* of the need for protection.⁹⁶ The protection under the trafficking instruments looks back at the past trafficking and allows for protection as a way of remedying that past wrong and bringing those responsible to justice. Asylum, on the other hand, is primarily interested in the future risk, that is the risk of harm upon return.⁹⁷ It does not look exclusively at the actual trafficking but is also interested in its implications in the future. This too broadens the availability and accessibility of protection.

The duration of protection is another important consideration. Protection under the trafficking instruments subsists until such time as the collaboration with the authorities ceases. Refugee status on the other hand is, in practice, a quasi-permanent declaration although different States renew the status at different

⁹⁶ See: See: James Hathaway, *The Law of Refugee Status*, (Butterworths, 1991);

⁹⁷ The Convention definition of a refugee speaks of a well-founded fear of persecution as the reason why an individual cannot go back to his country of origin

intervals.⁹⁸ In theory refugee status continues to subsist until such time as the well-founded fear of persecution no longer exists.⁹⁹ However, one may also consider that the frequent review of the right to a residence permit can have negative psychological implications on trafficked persons.

Other issues around accessibility include practical barriers to seeking protection including, for example lack of information about available options and hastened deportations practically impeding and preventing the possibility of seeking protection. In part this is remedied through provisions for 'reflection and recovery' periods. The COE Convention and the Residence Permit Directive allow for a reflection period in which the trafficked person should be provided with assistance and which would allow him/her to decide on whether he/she wishes to collaborate with the authorities. This can be granted on the basis of a presumptive identification of an individual as a trafficked person and includes the right not to be expelled provided a number of conditions are met. Practical barriers to accessing assistance and protection also call into play the need for adequate identification structures as an individual will not have access to any of these rights and entitlement unless, and until, he/she is identified, at least presumptively, as being a trafficked person. The emphasis placed on identification both in the legal instruments and by international organisations, more generally, is therefore commendable.

⁹⁸ See in this regard: Parosha Chandran, Nadine Finch, 'Residence for Victims of Trafficking in the UK: Humanitarian, Asylum and Human Rights Considerations' in Parosha Chandran (ed) *Human Trafficking Handbook: Recognising Trafficking and Modern-Day Slavery in the UK* (LexisNexis 2011) 246

⁹⁹ See: J.C. Hathaway, 'Reconceiving Refugee Law as Human Rights Protection' (1991) 4 *Journal of Refugee Studies* 113

2.2.3.3 Acceptable: Content of Protection

The third key indicator in the assessment of the protection potential of any instrument is the acceptability of protection it provides. In this context, the focus will be on the type of protection that it grants and the content thereof. After a brief overview of some of the protection relevant provisions, the section discusses three issues of particular relevance: risk assessments, safety related provisions and status related rights.

All of the counter-trafficking instruments make a number of protection relevant provisions regarding, *inter alia*, identification,¹⁰⁰ assistance and support,¹⁰¹ privacy,¹⁰² and non-criminalisation.¹⁰³ Whilst these are beyond the specific scope of this chapter, it is pertinent to note the importance of such provisions. The protection of trafficked persons is also catered for to varying degrees in the relevant instruments. We consider this first by looking into safety and risks assessments, second by dealing with immigration related provisions, namely those allowing trafficked persons to stay in the country of destination, and third by addressing those provisions aimed at persons within the criminal justice process and those available to all trafficked persons.

The Protocol makes an important, albeit weak, provision regarding the safety of trafficked persons in providing that:

¹⁰⁰ See in this regard: OHCHR Trafficking Guideline 2, Protocol Articles 11 and 10(1) a, COE Convention Articles: 7(1) and 10, 2011 Directive Article 11(4) and SAARC Convention Article VIII

¹⁰¹ See in this regard: OHCHR Trafficking Guideline 6, Protocol Article 6, COE Convention Article 12, 2011 Directive Article 11

¹⁰² See in this regard: Protocol Article 6(1), COE Convention Article 11, 2011 Directive Article

¹⁰³ This is missing from the Trafficking Protocol. See: OHCHR Trafficking Guideline 5(5), COE Convention Article 26, 2011 Directive Article 8

Each State Party *shall endeavour to provide* for the physical safety of victims of trafficking in persons whilst they are within its territory.¹⁰⁴

This provision, which relates to States of origin, transit and destination, is weak in nature (shall endeavour to) and does not create an obligation to protect. In the context of return, the Protocol obliges States to ascertain that return shall be with due regard to the safety of that person. This indirectly mandates a risk assessment to be carried out raising the possibility of other human rights obligations (including *non-refoulement*) being activated.

Similarly, the EU 2011 Anti-Trafficking Directive requires individual risk assessment and the provision of appropriate protection. However, this is restricted to individuals within the criminal justice process.¹⁰⁵ The 2004 Directive provides that ‘Member States shall take due account of the safety and protection needs of the TCNs’.¹⁰⁶ The 2011 directive also makes specific provisions regarding re-victimisation within the context of the investigation and trial. The CoE Convention requires States to ‘take due account of the victim’s safety and protection needs’ further providing that such protection is provided on a consensual and informed basis, also taking into account any specific vulnerabilities. Additionally, it includes specific provisions regarding those involved in the criminal justice process, including trafficked persons, other persons who report the offence or cooperate with the investigations, witnesses as well as when necessary, family members of such persons. The protection afforded

¹⁰⁴ Article 6(5)

¹⁰⁵ Article 12(3) of the Directive provides that: Member States shall ensure that victims of trafficking in human beings receive appropriate protection on the basis of an individual risk assessment, inter alia, by having access to witness protection programmes or other similar measures, if appropriate and in accordance with the grounds defined by national law or procedures. This provision is located under the broader title which sets its potential application to protection of victims of trafficking in human beings in criminal investigation and proceedings

¹⁰⁶ Article 7

under this provision is quite broad and includes a mix of measures, such as physical protection, relocation, identity change and assistance in obtaining jobs. The Convention also extends protection to associations involved in anti-trafficking also participate in the investigations and prosecution of trafficking. This protection is akin to witness protection programmes in other contexts, but it is offered to anyone involved within the criminal justice process and not only to those providing testimony. This is the broadest provision of this kind and reflects an understanding of the criminal networks and organisations that are often behind situations of trafficking.

A corollary to protection is the issue of status in the country of destination. A major problem is how trafficked persons are too often treated as irregular immigrants, subjected to detention and deportation.¹⁰⁷ This negatively impacts on trafficked persons (whose protection needs might not be addressed) as well as the criminal justice process. Arguments against allowing trafficked persons the right to stay in the country of destination have promoted the 'floodgates argument' noting how trafficking will become another channel to circumvent migration controls. Speaking of the drafting process of the Protocol, Gallagher reflects how:

The inclusion of some kind of right of trafficked persons to remain in the receiving country, at least temporarily (...) was never a serious option. Most delegations were concerned that the inclusion of such a right would further encourage illegal migration and actually benefit traffickers.¹⁰⁸

¹⁰⁷ See in this regard: Juss, 'Human Trafficking, Asylum and the Problem of Protection' (n 1); See also: Dina Francesca Haynes, 'Used, Abused, Arrested and Deported: Extending Immigration Benefits to Protect the Victims of Trafficking and to Secure the Prosecution of Traffickers' (2004) 26 Human Rights Quarterly 221

¹⁰⁸ Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling' (n 60) 992

The Protocol does, however, require States, in non-mandatory terms, to consider the adoption of measures allowing trafficked persons to remain in their territory, whether temporarily or permanently, giving appropriate consideration to humanitarian and compassionate factors.¹⁰⁹ The latter qualification reflects some understanding of the complexity of trafficking scenarios but again relies on the benevolence of States.

The CoE Convention and the EU Framework go one step further and create a two-tiered system. They require the granting of a 'reflection and recovery period' (in the case of the CoE Convention of at least 30 days) during which deportation is prohibited.¹¹⁰ The purpose is to allow the trafficked persons 'to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities'.¹¹¹ As the UNODC rightly confirms 'the reflection period is now recognised as an effective best practice and humanitarian measure aimed at protecting the human rights of trafficked persons'.¹¹²

The CoE Convention and the EU Framework also make provision for a renewable residence permit. As noted above, the Convention allows States discretion on whether such permits are to be issued on the basis of individual needs or be made conditional on cooperation. The non-renewal and withdrawal of such residence permits is also subject to national law, allowing a wide margin of appreciation for States. As discussed above, the residence permit under the Directive is conditional on the ability and intention of the trafficked person to cooperate with the authority

¹⁰⁹ Article 7(2)

¹¹⁰ See COE Convention Article 13 and 2004 Directive Article 6

¹¹¹ Article 13(1)

¹¹² UNODC, *Toolkit to Combat Trafficking in Persons* (United Nations 2008)

and is issued for a renewable minimum period of 6 months.¹¹³ No similar provisions are made in the SAARC Convention.

None of the instruments go as far as to require State parties to allow an unconditional right to trafficked persons to remain in the country of destination, even if in some cases such a right arises from other legal contexts, including the broader human rights framework and the activation of the principle of *non-refoulement*.

In terms of content of protection it can be noted that, under the Refugee Convention and other refugee law instruments, the rights and entitlements ascribed are greater than those assigned under the trafficking instruments. Foremost amongst these is the right to remain in the country for so long as the risk persists including possible access to long-term residence if the duration is of the requisite duration.¹¹⁴ In the case of persons qualifying for 'full' refugee status these rights include the right to family reunification that is not available to persons recognised as having been trafficked.¹¹⁵ It also includes a greater set of rights in terms of economic well-being.¹¹⁶ This in part reflects the distinction between refugee law provisions aimed at settlement and integration and the trafficking framework that views trafficked persons as an asset for the prosecution, therefore as a person who will only be in the country for a number of months or years, but is not intended to settle there permanently.

¹¹³ Article 8

¹¹⁴ For an in depth discussion of the rights and entitlements of refugees under international law see: James C H, *The Rights of Refugees under International Law* (Cambridge University Press 2005)

¹¹⁵ See Article 12 of the Geneva Refugee Convention and the provisions of the European Union Family Reunification Directive

¹¹⁶ See Article 17 to 19 of the Geneva Refugee Convention

2.2.3.4 Human Rights Externalities

A final indicator of the protection potential of anti-trafficking instruments is the possibility of human rights externalities, that is the possible side-effects of these instruments on the enjoyment of the broader human rights framework. The OHCHR Guidelines implicitly acknowledge the possibility of negative externalities and note that anti-trafficking measures ‘shall not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked, and of migrants, internally displaced persons, refugees and asylum seekers’.¹¹⁷

The various counter-trafficking instruments also try to mitigate some of these externalities through safeguard clauses,¹¹⁸ ensuring that rights and entitlements due under the broader human rights framework are not sidelined under the pretext of the trafficking instruments. The EU Framework establishes minimum standards and the Directives ‘shall not prevent Member States from adopting or maintaining more favourable provisions’.¹¹⁹ As Gallagher reflects, the significance and impact of these clauses should not be understated.¹²⁰

One key concern relates to provisions aimed at strengthening border controls.¹²¹ Whilst the potential of border efforts for the prevention and identification of trafficked persons cannot and should not be understated, these provisions can provide a pretext for closing down borders further, negatively affecting prospects of legal migration and access to protection. These measures have resulted in further obstacles faced by refugees and asylum seekers in acquiring protection. At a time

¹¹⁷ Para 6 of OHCHR Guidelines (n 30)

¹¹⁸ See as example: Article 14 of the Trafficking Protocol

¹¹⁹ Article 4

¹²⁰ Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground?’ (n 60)

¹²¹ See as example: Article 11 of the Trafficking Protocol

when securitisation is the rule in border management, and when States are keen to close their borders to all migrants, including asylum seekers, the Trafficking Protocol risks providing 'a context for developed States to pursue a border control agenda under the cover of promoting human rights'.¹²² Increasing the risks for the 'service providers' when met with stable demand for the service increases the price.¹²³ This, in turn, results in more people falling into situations of debt bondage and consequently into the hands of traffickers. Koser¹²⁴ argues that there 'are clear indications that trafficking is burgeoning in the stifling climate of asylum restrictions'.¹²⁵

Moreover, a number of States have used the pretext of counter-trafficking to restrict the opportunities of voluntary migration for women and girls restricting their freedom of movement in a discriminatory way.¹²⁶ Speaking about the SAARC Convention, IOM notes that 'the Convention includes provisions that potentially encourage state parties to adopt measures that can adversely affect the mobility rights of women and children in the interests of preventing trafficking, which has occurred in some SAARC countries.'¹²⁷ Gallagher notes how restrictions put in place under the pretext of counter-trafficking efforts often limit women's (and especially women of a certain age) options in terms of destinations and occupations.¹²⁸ Such

¹²² Hathaway, 'The Human Rights Quagmire of Human Trafficking' (n 31) 26

¹²³ Demand for migration is not likely to diminish, provided that the massive disparities of wealth and opportunities continue to subsist

¹²⁴ Khalid Koser, 'Asylum Policies, Trafficking and Vulnerability' (2000) 38 *International Migration* 3

¹²⁵ *Ibid*, 106

¹²⁶ See: Vandenberg, 'Complicity, Corruption, and Human Rights: Trafficking in Human Beings' (n 80) 8. Vandenberg reports how in one village in Romania, women's passports were collected by the local police, under the pretext of preventing trafficking but in reality merely prohibiting women's options to leave. Richards refers to similar measures in Thailand, Nepal and Bangladesh. See: Kathy Richards, 'The trafficking of migrant workers: what are the links between labour trafficking and corruption?' (2004) 42 *International Migration* 147

¹²⁷ International Organisation for Migration, *Review of the SAARC Convention and the Current Status of Implementation in Bangladesh* (2009) 22

¹²⁸ Gallagher, *The International Law of Human Trafficking* (n 35) 161

measures have been implemented both in countries of origin and of destination, and have in some cases disproportionately affected the rights of the individuals concerned.

The United Nations special rapporteur on trafficking in persons, especially of women and children, notes how ‘a number of States reportedly prohibit certain citizens from migrating, judging them to be potential victims of trafficking based on their sex, age, status or destination countries’.¹²⁹ In India, for example, female household workers under the age of 30 are prohibited from seeking and taking up jobs in Saudi Arabia.¹³⁰ Brazilian women were denied access to European countries on the pretext that they looked like prostitutes and were therefore suspected of having been trafficked.¹³¹ In Nepal, girls who had been intercepted whilst crossing into India were stigmatised in their communities because they had been intercepted by organisations known to work with sex workers.

Some of the protection measures to which the instruments refer have been misconstrued and misapplied as justifying the detention and other human rights violations of trafficked persons. Such detention is often justified under the pretext of shelter and support, protection from further harm, and securing cooperation in investigations and prosecutions. Detention is sometimes mandated by immigration control requirements.

Moreover, as highlighted elsewhere, the conditionality of protection can heighten the risks for trafficked persons. Individuals who give evidence against their

¹²⁹ Joy Ezeilo, ‘Thematic Analysis: Prevention of Trafficking in Persons’ in United Nations (ed), *Report of the Special Rapporteur on Trafficking in Persons Especially Women and Children* (United Nations 2010) 13

¹³⁰ Ibid

¹³¹ Ibid

traffickers heighten their risks of being targeted by the same trafficker or his/her associates. Hathaway argues that counter-trafficking efforts have taken the attention away from the issue of slavery more broadly.¹³² These externalities can be avoided through a bona fide interpretation and implementation of the requirements of the various counter-trafficking instruments.

Whilst asylum addresses a number of shortcomings found in the anti-trafficking instruments, in itself it still has a number of important weaknesses in this context. Edwards identifies some of these as including: low recognition rates, lack of capacity of status determination authorities to handle the complexities of trafficking based asylum claims, lack of awareness of the right to apply for asylum and discouragement by long delays and complicated procedures.¹³³ Stepnitz, in turn, identifies some of the practical disadvantages that the over-approximation of trafficking and asylum might have on trafficked persons. These include the shift of specific concerns like future risk onto national referral mechanisms processes, and the extension of the culture of disbelief.¹³⁴ We return to some of these challenges elsewhere in this research.

2.2.3.5 Further Remarks

This chapter has highlighted the limited protection potential of the counter-trafficking instruments. This reflects how these instruments were never intended as human rights instruments but rather were primarily adopted with crime-control objectives. As a result, the focus is on immigration and crime control with support for trafficked persons as a convenient output, but not a driver of ensuing policy and

¹³² James Hathaway, 'The Human Rights Quagmire of Human Trafficking' (n 31)

¹³³ Edwards 'Traffic in Human Beings: At the Intersection' (n 37)

¹³⁴ Stepnitz, 'A Lie More Disastrous Than The Truth', (n 26)

practice.¹³⁵ However, the important human rights dimension of trafficking requires lawyers, academics and activists to look for other options. Various such options exist. First, one could look for protection measures available under the general and specific human rights framework, including within the prohibition of forced labour, servitude and slavery and within the Convention Against Torture. In this area the European Court of Human Rights has elaborated a number of important positive obligations for States.¹³⁶ Another avenue for this protection is asylum. As this chapter has highlighted, asylum offers a viable channel for the protection of trafficked persons by extending the scope of protection, and overcoming some of the shortcomings, in the protection provisions of the counter-trafficking instruments. This overlap is recognised in the anti-trafficking instruments including: Article 14 of the Protocol, Article 40 of the COE Convention and the Preamble and Article 11(6) to the 2011 Directive.

There is scope for the two protection regimes to be applied in tandem with asylum offering a supplementary rather than an alternative channel for protection. Protection and assistance under the trafficking instruments provide a more tailored approach to the specific needs of trafficked persons making reference to psychological and other assistance for instance. Moreover, remedies under civil law and under trafficking law can provide significant remedies against traffickers, including for the payment of earned salaries and damages. The importance of such compensatory measures should not be understated. Moreover, identification as a trafficked person by the 'trafficking framework' – i.e. the National Referral

¹³⁵ Ibid

¹³⁶ Ryszard Piotrowicz, 'States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations' (2012) 24 International Journal of Refugee Law 181

Mechanism – provides at least part of the evidence required for the determination of refugee status. Identified trafficked persons should therefore be informed of their right to seek asylum and models of referral between the two systems should be established.¹³⁷ For some individuals, however, asylum may be the only possible channel of protection.

Part 3: Concluding Remarks

This chapter has highlighted the various points of intersection between trafficking and asylum, focusing on the viability and need of asylum as a channel for the long term protection of trafficked persons. The opportunity of protection under refugee law, coupled by the limited options faced by individuals who have been victims of some of the most egregious human rights violations, places a responsibility on refugee lawyers and courts to reflect the real purpose of asylum, thus extending protection to trafficked persons. Edwards explains how ‘the asylum channel is often the only one available’.¹³⁸ However, the protection that may be afforded within the purview of refugee law is additional to and distinct from that due under the trafficking instruments and other relevant instruments. As Juss eloquently argues: ‘the case of human trafficking provides refugee law courts and lawyers with a context in which to map out the contours of protection that can be a useful model for similar future cases’, whilst ‘the sheer frequency with which victims of human trafficking now raise refugee asylum claims is such that the courts can hardly ignore

¹³⁷ On the possibility of referral between the two systems see: Jacqueline Bhabha and Carmen Alfiev, ‘The Identification and Referral of Trafficked Persons to Procedures for Determining International Protection Needs’ (Legal and Protection Policy Research Series 2009)

¹³⁸ Edwards, ‘Traffic in Human Beings: At the Intersection’ (n 37)

their impact on refugee law.’¹³⁹

As the phenomena overlap, both in fact and in law, policy developments in both areas must work in sync in order to ensure that the negative ripple effects of one field onto the other are adequately mitigated. Finally, these overlaps create a mutual learning space for organisations and entities making determinations and offering support. They also highlight the need for greater policy coherence between different areas with varying policy objectives.

¹³⁹ Juss, ‘Human Trafficking, Asylum and the Problem of Protection’ (n 1)

Chapter 3: Well-Founded Fear

This chapter critically engages with the notion of ‘well-founded fear’ in the context of trafficking based asylum claims. The term refers to ‘a forward looking expectation of risk based on objective reasons for such fear’.¹ It is argued here that such fear ought to be assessed primarily against the applicant’s personal, social and economic circumstances and the protection that is available and accessible to the individual applicant in his/her specific circumstances. The object of assessment is the individual applicant in his/her specific context. The assessment asks a number of inter related questions including:

- Does the individual applicant have an expectation of future persecution?
- Is that fear justified when considered against the general circumstances including those prevalent in the State of origin?
- Especially in cases of non-state agents of persecution, does the State of origin offer sufficient protection against such persecution?
- If the individual cannot be safe in his hometown, can such protection be established elsewhere in the country of origin?
- If so, will it be unduly harsh to expect the applicant to move to a different part of the country of origin?

This chapter makes a number of core claims. First, that an assessment of past experience of trafficking is critical to the determination of well-founded fear in

¹ Andreas Zimmermann, ‘Article 1A, para.2 - Definition of the Term Refugee’ in Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol - A Commentary*, vol 1 (Oxford University Press 2011) 338

various ways. In particular, this chapter identifies a number of important correlations between human trafficking on the one part, and corruption, poverty and inequality on the other. Second, any assessment of 'well-founded fear' in trafficking based claims requires an assessment of both structural and proximate factors that heighten vulnerability. Third, various legal and policy instruments as well as evidentiary tools ought to be used to address the issue of State protection and in determining the specific legal obligations to which the particular State adheres or otherwise.

This chapter is organised as follows. Part 1 presents the notion of well-founded fear and the key legal principles around its application, applying these principles to trafficking based asylum claims. Part 2 deals with the issue of past experiences (including past trafficking, attempted trafficking and threats of trafficking) reflecting on the relevance of these experiences on the determination of future risk. Part 3 deals with issues of vulnerability to trafficking related persecution. It identifies strong correlations between poverty, corruption, discrimination and human trafficking, and briefly outlines how each of these impacts on vulnerability. It also deals with specific situational circumstances (namely conflict situations) and specific vulnerabilities to specific types of harm (with a focus on specific vulnerabilities in the context of re-trafficking). Part 4 addresses the second limb of the assessment by looking at issues of State protection. Further to a brief elaboration of the conceptual relevance of State protection in refugee law, it moves on to discuss some of the most critical State obligations emanating from international and regional instruments including, but not exclusively, the anti-trafficking instruments. Part 5

concludes by briefly elucidating the core arguments and findings of the chapter engaging the findings within the broader scope of the research.

Part 1: Well-Founded Fear Overview

As the Michigan Guidelines on Well-Founded Fear² briefly and eloquently outline, there are three broad interpretations and applications of the notion of ‘fear’ in the context of the refugee definition. The first reads the term fear as trepidation and sees it as one of two essential elements of the well-founded fear test. This so called bi-partite approach was promoted by the UNHCR in its Handbook³ and widely adopted by courts across the world with only slight modifications.⁴ It is based on one

² The Colloquium on Challenges in International Refugee Law, *The Michigan Guidelines on Well-Founded Fear* (Michigan Guidelines on the International Protection of Refugees 2009). The guidelines are a result of the Colloquium on Challenges in International Refugee Law hosted by the University of Michigan, United States. The stated purpose of the colloquium was to ‘tackle a single, cutting-edge concern via preparatory study and a three-day debate and policy formulation meeting, thus producing the Michigan Guidelines on that particular issue’. A total of 5 sets of guidelines have been produced thus far and these are regularly cited by courts around the world, and thus play an important role in shaping the development of refugee law. The Preamble to the Well-Founded Fear specific guidelines indicates the following: These Guidelines are intended to promote a shared understanding of a unified approach to the well-founded fear inquiry and related aspects of the Convention refugee definition that both avoids the protection risks increasingly associated with assertions of a “subjective element,” and also ensures that due regard is accorded all particularised risks faced by an applicant for recognition of refugee status. For more information see: <http://www.law.umich.edu/centersandprograms/refugeeand asylumlaw/Pages/colloquiumandmichguidelines.aspx> [last accessed: 5 October 2013]

³ Para 38 of the Handbook provides: To the element of fear – a state of mind and a subjective condition – is added the qualification ‘well-founded.’ This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term ‘well-founded fear’ therefore contains both a subjective and an objective element

⁴ See for instance: *R v. Secretary of the Home Department, Ex parte Miah*, (1994) Imm AR 279, United Kingdom: High Court (England and Wales), 21 January 1994; *R v. Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals (UN High Commissioner for Refugees Intervening)*, (1988) AC 958, (1988) 1 All ER 193, (1988) 2 WLR 92, (1988) Imm AR 147, United Kingdom: House of Lords (Judicial Committee), 16 December 1987; *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, United States Supreme Court, 9 March 1987

of the dictionary definitions of fear as ‘the emotion of pain or uneasiness caused by the sense of impending danger or by the prospect of some possible evil’.⁵

Any focus on such subjective fear carries significant normative and practical risks as is now well acknowledged including in a significant body of case law. One such risk is the weight it places on the applicant’s ability and willingness to display emotions. Absent such (visible) fear, the claim for protection cannot succeed. Under this interpretation, ‘an applicant found not to be fearful must be denied refugee status, despite a finding that he or she faces a real chance of being persecuted if returned to the country of origin’.⁶ Moreover, procedurally, this approach assumes an ability by status determination officers and courts to ascertain, with some level of certainty an individual’s subjective fear. This, as Hathaway and Hicks note ‘is generally difficult if not impossible.’⁷ This is especially so in a context where trauma and other psychological barriers are rife and where issues of sexual abuse are prominent.

Trauma associated with trafficking will sometimes manifest itself in an inability to share feelings such as fear, or the mental and emotional withdrawal of the applicant. This will negatively impact on the credibility of the applicant and consequently the chances of protection.⁸ This is an issue to which we return in Chapter 8 where various procedural issues involved in trafficking based claims will be outlined. As Hathaway and Hicks conclude ‘the bipartite approach, by its very

⁵ Oxford English Dictionary Online as quoted in Andreas Zimmermann, Jonas Dörschner and Felix Machts, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) 336

⁶ James C Hathaway and William S Hicks, ‘Is There A Subjective Element in the Refugee Convention’s Requirement of Well-Founded Fear’ (2005) 26 *Michigan Journal of International Law* 505, 514

⁷ *Ibid* 517

⁸ The issue of the claimant’s credibility is critical in this context. Indeed, issues around the determination of credibility are now well identified in the literature. See for instance: Hunter, Jill; Pearson, Linda; San Roque, Mehera and Steel, Zac. *Asylum adjudication, mental health and credibility evaluation* (2013) 41 *Federal Law Review* 3

nature, admits of the possibility that genuinely at risk persons will be denied refugee status'.⁹ This flies in the face of the human rights requirement that 'protection be equally open to all on the basis of evidence of an actual and relevant form of risk.'¹⁰

A second interpretation sees subjective fear (read: trepidation) as a factor capable of supporting existing evidence of actual risk or overcoming insufficiency of evidence in this regard. Subjective fear is therefore not considered an essential requirement but one that tops up an objective claim that can, in theory, stand alone. It is seen, therefore as a plus factor.¹¹ Under this formulation, persons who are capable of demonstrating their subjective fear in a way recognisable as such by the status determination authorities will be at a relative advantage¹² over those whose subjective fear is less well pronounced but who face equal risk upon return. This is an amended approach to the first interpretation that addresses some of the concerns but remains potentially significantly flawed in terms of final result. It is a weak attempt to keep an inept interpretation alive despite its normative and procedural weaknesses. The key challenge of determining (the veracity of) subjective fear remains. Some of the ways the courts have sought to remedy these problems are: through the reasonable person inquiry, inferences from pre-application conduct, and equating credibility to fearfulness. Some of these tests have proven to be problematic in the context of trafficking as will be briefly elaborated below. It is argued here that the existence of subjective trepidation is implied in the act of seeking international protection. It should therefore be taken as

⁹ Ibid 517

¹⁰ The Colloquium on Challenges in International Refugee Law, '*The Michigan Guidelines on Well-Founded Fear*' (n 2) para 5

¹¹ Hathaway and Hicks (n 6) 534

¹² This can be distinguished from absolute advantage under the approach discussed above

a given before moving to the determination of whether there exists a well-founded fear of persecution by reference to the objective situation in the country of origin.

The third, and (it is argued here) most 'legally authentic' interpretation, understands 'fear' as an expectation of future risk. Such interpretation is merited by the wording of the provision in English, by the reference to '*craintre avec raison*' in the French text of the Convention, by the interpretive requirement of internal consistency,¹³ and the general object and purpose of the Convention. As Zimmermann summarises 'the object and purpose of the 1951 Convention thus supports an interpretation of the notion of well-founded fear as a forward-looking expectation of risk based on objective reasons for such fear.'¹⁴

There is therefore significant basis for an understanding of well-founded fear as primarily requiring an objective determination of risk(s) rather than subjective trepidation. The determination of well-founded fear will necessarily depend on the category of the applicant in the individual case. Persons who have already been trafficked, for instance, will face lesser hurdles proving that their fear of trafficking related persecution is well-founded in part due to the presumption linked to past persecution. Moreover, it is generally easier for an individual to prove a well-founded fear of State persecution than of persecution by non-State actors. In the latter case, the determination will be two pronged. First, whether the well-founded fear exists and second, whether there is sufficiency of State protection in the country of origin (including in a different part thereof). As will be noted elsewhere, most trafficking based claims are deemed to be based around non-State agents of persecution however there is scope under the principles of international law (and

¹³ See: Hathaway and Hicks (n 6)

¹⁴ Zimmermann (n 5) 338

specifically the articles on State responsibility) to consider a broader spectrum of these cases as falling within the scope of State-persecution as the State can be considered responsible by virtue of the attribution of conduct of its officials and/or its failure to exercise due diligence. This is an issue to which we will return in the next chapter. For present purposes the key point is that where the agent of persecution is the State, the discussion around sufficiency of protection and indeed internal relocation alternatives will not be engaged. Moreover the specific personal, social, cultural and legal situation of the individual applicant will also inform the discussion around vulnerability to further trafficking related harm. We first discuss the relevance of past experiences of trafficking in proving a well-founded fear of trafficking related persecution in the future.

Part 2: Past Experiences of Trafficking

Most claims assessed for this research concerned individuals who had already been trafficked and were seeking protection from re-trafficking or further trafficking related harm. There is a strong moral argument for protecting individuals exclusively on the basis of their past experiences of egregious human rights violations and the trauma associated therewith. As will be seen in the forthcoming chapter in some cases, the past experience and its effect are of such nature or severity that they can be considered to be 'continuing persecution' and thereby removing the need to prove a well-founded fear altogether. In limited cases this is encouraged by the

UNHCR.¹⁵ In such cases, the moral argument takes on a legal cloak and may become a legal obligation.¹⁶

Moreover, past persecution plays a critical role in establishing a well-founded fear of future harm. Past persecution is not a requirement for refugee protection, but when present, it significantly assists in proving eligibility thereto. This has been formalised into a presumption enshrined in EU law and developed through case law in various jurisdictions both within and beyond Europe. The 2011 *Qualification Directive* enshrines this development in providing that:

The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.¹⁷

Even before this provision was enacted by the European Union law makers,¹⁸ in the UK this presumption was firmly established in the case of: *Demirkaya v. Secretary of*

¹⁵ In para 16 the UNHCR Trafficking Guidelines provide that: in cases where the trafficking experience of the asylum applicant is determined by a one-off past experience, which is not likely to be repeated, it may still be appropriate to recognise the individual concerned as a refugee if there are compelling reasons arising out of previous persecution, provided the other interrelated elements of the refugee definition are fulfilled. This would include situations where the persecution suffered during the trafficking experience, even if past, was particularly atrocious and the individual is experiencing ongoing traumatic psychological effects which would render return to the country of origin intolerable. In other words, the impact on the individual of the previous persecution continues. The nature of the harm previously suffered will also impact on the opinions, feelings and psychological make-up of the asylum applicant and thus influence the assessment of whether any future harm or predicament feared would amount to persecution in the particular case. UN High Commissioner for Refugees, *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked*, 7 April 2006, HCR/GIP/06/07

¹⁶ The guidelines in this context are of an interpretive nature rather than creating 'new' obligations.

¹⁷ Article 4(4)

¹⁸ This provision was first adopted in the 2004 Qualification Directive and has been retained in the Recast of the same Directive adopted in 2011. By virtue of the strength of EU Law it has also been incorporated into the national law of the European Union Member States. Reflecting the provision, Article 339k of the UK Immigration Rules provide that: the fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of a person's well-founded fear of persecution or real risk of serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated. *Immigration Rules (last amended July 2008)*, HC 395 (as amended), 23 May 1994

*State for the Home Department*¹⁹ where the court noted that such a presumption is 'no more than common sense'.²⁰ In *Natynczy*,²¹ the Canadian Court noted that whilst the test for a well-founded fear is forward-looking, in situations where past persecution is alleged, the determination authorities ought to assess those incidents because 'evidence of past persecution is one of the most effective means of showing that a fear of future persecution is objectively well-founded.' In *Rreshpja* the court summarised the US position in stating that if the asylum applicant satisfies her burden of establishing past persecution she is presumed to have a well-founded fear of future persecution.²² This is a counter-presumption to the presumption of State protection.

Past experience of persecution therefore creates a strong rebuttable presumption that the fear of future persecution is well-founded. It balances on the one hand the need for a future risk and on the other the appeal of protecting persons based primarily on past experiences of human rights violations. It also reflects the practical reality that if something has happened once it is reasonable for the victim thereof to expect (read: fear) that it might happen again unless there are significant changes in circumstances.

Trafficked persons (read: former victims of human trafficking) therefore benefit from a strong rebuttable presumption that their fear of further/repeated trafficking related persecution is well-founded. This implies a shift of focus from proving that the applicant ought to be protected to one where the authorities will seek to argue

¹⁹ *Haci Demirkaya v. Secretary of State for the Home Department*, United Kingdom: Court of Appeal (England and Wales), 23 July 1999

²⁰ *Ibid* para 21

²¹ *Natynczyk v. Canada (Minister of Employment and Immigration)*, (F.C., no. IMM-2025-03), O'Keefe, June 25, 2004, at para. 71

²² *Rreshpja v. Gonzales*, 420 F.3d 551 (6th Circuit 2005)

a change in circumstances that addresses that well-founded fear. Whilst there is no clear guidance of what sort of evidence is required in order to overturn the presumption, some assistance can be found in the change of circumstances provisions linked to cessation of refugee status. Commenting on these provisions, Hathaway refers to the need for changes of substantial political significance, which are meaningful and durable, effectively requiring clear evidence of a radical change in conditions.²³

In the most part the change will be in the country situation although some courts have, in somewhat worrying cases also looked at personal circumstances of the applicant. In *VD Albania* for instance, the Court rejected a claim of well-founded fear on the basis that the applicant was now older and fell beyond the age group within which the majority of trafficking occurred. The case involved a claim by a 30-year-old Albanian woman who had been trafficked for forced marriage after being abducted by traffickers at the age of 28. Her abductors had raped the appellant before she escaped and managed to make it to the UK. She believed that her sister had also been trafficked. Relying exclusively on country information, and failing to take cognisance of the reality of the story before it, the Court found that the (very real) abduction was an unusual occurrence that was not likely to be repeated. At age 30, the Court noted, the risk was even further reduced.²⁴ It is fair to state that this reasoning was not identified in any cases beyond the United Kingdom.²⁵

²³ James Hathaway, *The Law of Refugee Status* (Butterworths 1991)

²⁴ *VD (Trafficking) Albania v. Secretary of State for the Home Department*, CG [2004] UKIAT 00115, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 26 May 2004 Para 18

²⁵ See also: Kaori Saito, 'International Protection for Trafficked Persons and Those Who Fear Being Trafficked' (2007) *New Issues in Refugee Research* 149

In this regard, evidentiary issues come into play. The ranking of a particular State in the United States Trafficking in Persons report will often be utilised as a tool in this regard. On this point Chandran and Finch argue that:

Where the country of origin has been ranked at the same tier or lower by the US State Department Trafficking in Persons since the year in which the individual was trafficked this will evidence, in Demirkaya terms, a likelihood that the risk of re-trafficking either internationally or internally, is real. Where however the country has been given a higher ranking since the time of the original trafficking the authors suggest that this will not constitute a 'significant change' under the Demirkaya principle without more.²⁶

Whilst at face value this appears to apply a double standard depending on whether or not the evidence is in favour or against the applicant, this is justified on by the need for more evidence to rebut the strong presumption that the fear of re-trafficking is well-founded. In many of the assessed cases a large part of the discussion revolved around the reversing of this presumption based on the notion of sufficiency of protection. This will be discussed in further detail below when looking at what can be expected of States of origin, what their obligations are, and what level of State protection will suffice to overcome the well-founded fear determination.

Specific aspects of past experiences of trafficking will also influence the determination of whether one's fear of future persecution is well-founded. Examples of such aspects will include: the involvement of public officials, including police and border guards, in the previous trafficking, the nature, size and reach of the criminal enterprise behind the trafficking, the particular threats made by the traffickers, any 'debt' still (perceived as) owed to the traffickers, the risks that

²⁶ Parosha Chandran, Nadine Finch, 'Residence for Victims of Trafficking in the UK: Humanitarian, Asylum and Human Rights Considerations' in Parosha Chandran (ed) *Human Trafficking Handbook: Recognising Trafficking and Modern-Day Slavery in the UK* (LexisNexis 2011) 255

escape or liberation presents to the trafficker, whether the trafficked person has cooperated with the authorities in investigating and prosecuting the traffickers, and the involvement of family members. In *AZ (Thailand)* for instance, the UK Courts noted how the fact that the trafficker was connected to immigration and other officials in the country further strengthened the argument that the applicant's fear of trafficking related persecution was well-founded.

3.2.1 Attempts and Threats of Trafficking and related Harm

Attempted trafficking is criminalised under the anti-trafficking instruments and under the general principles of criminal law.²⁷ However it also provides a strong basis for a finding that one's fear of trafficking related persecution is well-founded. A number of cases assessed through this research noted instances where people managed to escape their traffickers and were threatened by the same.²⁸ It will be noted that persons against whom attempts at trafficking were not successful might find it harder to both convince a court of having a well-founded fear of persecution and to be categorised as members of a trafficking based social group for the purposes of the second part of the definition.²⁹ It is unfortunate that in the most part, courts have not addressed the well-founded fear component of such claims because the Convention ground requirement was considered not met.

²⁷ See for instance: Article 5(2) of the Trafficking Protocol, Article 21 of the COE Trafficking Convention, Article 3 of the 2011 Trafficking Directive. See more generally: Kelly E Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children' (2001) 8 Human Rights Brief 12

²⁸ See: Kelly Karvelis, 'The Asylum Claim for Victims of Attempted Trafficking' (2013) 8 Northwestern Journal of Law & Social Policy 274

²⁹ As noted in previous chapters, the protection through asylum of persons at risk of trafficking (and persons against whom trafficking attempts have been made) is particularly important when considering that other protection measures including the T-Visa and its European equivalent, are only available to persons who have in fact already been trafficked

This issue was raised in *RRTA 727*³⁰ where the Australian Tribunal determined that the applicant, who had been subject to a kidnapping attempt, was someone with regard to whom Australia had protection obligations. The applicant recounted how some unidentified men had tried to abduct her into their van whilst she was being driven to work by her mother. She managed to fend them off with the help of her mother. She linked this to abduction for the purpose of organ removal and forced prostitution prevalent in the country noting how 'girls disappear and later reappear without a kidney, if they are ever heard from again. They are often drugged and sent to other countries to be used as prostitutes in organised brothels.'³¹ She highlighted that 'she was particularly at risk because she has already been identified and targeted by a criminal gang for that purpose'.³² The tribunal accepted the attempted kidnapping after application of some benefit of the doubt³³ and on that basis accepted the existence of a real chance that the same people would target the applicant again within the reasonably foreseeable future.

Closely associated with this is the issue of threats. The use of threats against self and family is a critical tool used by traffickers in exerting control over trafficked persons. Such threats, including threats that 'if you leave we will find and kill you' or 'we will find and traffic / harm your daughter / sister' have been considered by some courts as creating a well-founded fear of persecution. Such threats must also be considered within the national context in assessing the likelihood that such threats will be carried out and that the national protective environment will prove unable or unwilling to curtail it.

³⁰ *RRT Case No. 0903290*, (2009) RRTA 727, Australia: Refugee Review Tribunal

³¹ *Ibid* Para 22

³² *Ibid* Para 39

³³ *Ibid* Para 39

Of particular relevance in the present context, however, are threats of trafficking or harm even if the person has not yet been trafficked. This issue arose in *Rreshpja v. Gonzales*³⁴ that involved an Albanian national who experienced an attempted kidnapping accompanied by a threat. As she ran away from the kidnapper 'she heard her attacker say that should not get too excited because she would end up on her back in Italy, like many other girls.'³⁵ She understood that statement to be a threat that she would be kidnapped and forced to work as a prostitute. Notwithstanding this direct threat the court found that the applicant had failed to prove a well-founded fear of persecution.

Threats have also been reported by applicants who were targeted not as trafficked persons themselves but rather because of their activities to combat human trafficking or because of their association with trafficked persons. In *Refugee Appeals 76478-76481* the court addressed claims by a family the husband of which was engaged in counter-trafficking work. As a result of his activities, an attempt was made to kidnap him whilst threats of harm against all of the family had been received from a mafia gang believed to be involved in human trafficking. The court, in that case determined that the husband was a refugee for the purpose of the Convention noting that the attempts and treats provided a basis for a well-founded fear of harm.

The UNHCR Guidelines address the issue of past persecution and/or harm experienced by persons other than the trafficked person him/herself noting that reprisals inflicted on family members could render the fear of persecution on the part of the trafficked persons well-founded, despite not having been subjected to

³⁴ *Rreshpja v. Gonzales*, 420 F.3d 551 (6th Circuit 2005)

³⁵ *Ibid* 2

the reprisals directly.³⁶ This is particularly relevant when one notes that traffickers often threaten trafficked persons of harm to their loved ones as a means of maintaining psychological control over them.

This is also in line with the objective determination of risk in stating that the risk is present irrespective of whether it was directly inflicted on the applicant him/herself. The harm experienced by family members does not need to be the same as that which the applicant might fear. For instance, family members might suffer violence whilst the applicant fears re-trafficking. The contrary may also be applied. The first tribunal in *Suvorova* used the fact that the applicant's family had not been harmed despite threats of the same as showing that the criminal organisation no longer sought to harm her and that her fear was therefore not well-founded.³⁷ The overall assessment was overturned upon appeal.

3.2.2 Return to One's Country of Origin

We noted above that courts have relied on a number of issues to determine whether an applicant has a genuine subjective fear of persecution. The return, or attempted return, to one's country is often taken by Courts to imply a lack of subjective fear and thereby impeding the recognition of refugee status.³⁸ The basis for this presumption is the assumption that if one returned to his country then he must necessarily not be afraid of harm there. This is weak at best. It also contradicts the requirement of 're-establishment' as set out in the cessation clause that does not include mere visits and, therefore, falls foul of the internal consistency

³⁶ The exact wording from the judgment is as follows: Reprisals by traffickers could also be inflicted on the victim's family members, which could render a fear of persecution on the part of the victim well-founded, even if she or he has not been subjected directly to such reprisals

³⁷ Para 15(2)

³⁸ This is especially so when the courts are looking for trepidation as a constitutive element of the 'well-founded fear' standard

requirements under the Vienna Convention on the Law of Treaties.³⁹ The issue is particularly relevant in the context of trafficking based claims where, for instance, an applicant was exploited in the country of asylum. This issue was discussed extensively by the UK Court in *AZ (Thailand)*⁴⁰ where the Secretary of State for the Home Department relied heavily on the attempt by the applicant to return to Thailand.

This case involved a Thai woman, trafficked into the UK for the purposes of sexual exploitation. She was held in three brothels across the UK on a rotating basis and often transported to hotels to offer services. She endured this for around 8 months and threats to herself and her daughter were used to maintain control over her. The case describes horrific harm experienced by the applicant including enduring anal intercourse, being forced to perform oral sex and to act out perverse sexual fantasies. Throughout her time in captivity she had been injected with drugs, whipped, made to behave like a dog and forced to work during menstruation. Condoms were not always used and she could not object. Any objection or refusal was met with harsh consequences, including being sent to another house and having to work twenty hours a day and service 20-30 men. An attempt at escaping resulted in her being beaten by a gun, locked up in a small dark room without food and threatened that her trafficker, M, would kill her.⁴¹ After months of exploitation she escaped and was arrested at Heathrow airport for attempting to use false documentation (she attempted to use documents provided to her by her trafficker), an offence for which she was imprisoned for four and a half months. The Secretary

³⁹ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, 331

⁴⁰ *AZ (Trafficked women) Thailand v. Secretary of State for the Home Department*, CG (2010) UKUT 118 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 8 April 2010

⁴¹ *Ibid* Para 5

of State sought to rely on this as proof that she did not have a subjective fear of harm in Thailand.⁴² This description is contrasted with the respondent's claim that the applicant had not shown a fear of returning to her home country despite having brought claims for international protection, and had done so only after she spent time in prison for the document fraud charge. This issue of criminalisation of trafficked persons is something we return to in Chapter 6.

On this issue, the court deliberated on the harm experienced in the UK, in finding that the attempted return to Thailand did not show a lack of fear of returning to Thailand but rather was explained by the applicant's feeling that she did not have many options. The Court rightly noted that the applicant's actions had to be considered within the broader context of the atrocious harm she had endured in the UK. It concluded that:

It is difficult to imagine how the appellant must have felt at that time but faced with the choice of remaining in the UK where she had only known misery and abuse, where she knew no one and had nowhere to go, or of returning home where, despite any dangers she might face, she at least had her daughter, we can understand why she acted as she did.⁴³

Similarly, delay in applying for asylum allows for an adverse inference to be drawn on the applicant's credibility and thereby the assessment of whether he/she has a genuine fear of persecution. This is particularly problematic in the case of trafficking based asylum claims where individuals might not be able to apply for asylum right away, or may be afraid of coming forward to the authorities, or may simply be unaware of the possibility. The trafficking experience can produce a profound shame response and this may also explain the delay in seeking protection (or contacting the

⁴² Ibid Para 113

⁴³ Ibid Para 115

authorities). Specific incidents and experiences will only be disclosed after the applicant has been in the process for some time and potentially be receiving therapy and help in overcoming the trauma and other psychological conditions which may impact on the ability and willingness of the applicant to divulge specific information and disclose particular experiences.⁴⁴ Having discussed some issues relevant to the determination of well-founded fear in the individual case, it is pertinent to briefly engage with the issue of vulnerabilities to trafficking. These will inform the assessment on well-founded fear in that they highlight the relevant issues to be considered, and broadly portray whether an individual applicant is likely to face trafficking related persecution.

Part 3: Vulnerabilities to Trafficking

It is self evident that the vulnerability to trafficking of an individual applicant will be a key issue in determining whether one's fear of trafficking related persecution is well-founded. This discussion is included here, because one's vulnerability to trafficking will necessarily inform the determination of whether one's fear of persecution is well founded or not. Indeed in the cases assessed, the determination of one's vulnerability to trafficking was a critical element of the status determination process. Whilst reliable data on the prevalence of human trafficking in individual countries remains largely elusive, vulnerability to human trafficking can be

⁴⁴ See: Heaven Crawley, *Refugees and Gender: Law and Process* (Jordan 2001) 210

determined by an analysis of a combination of personal, social, economic, and political factors.⁴⁵

Whilst there is no universally accepted definition of the term vulnerability in the context of trafficking, it is commonly used to refer to exposure to the possibility of trafficking. It refers to the condition, situation and standing of an individual in a specific context.⁴⁶ For the present purposes the term is used to refer to the 'condition resulting from how individuals negatively experience the complex interaction of social, cultural, economic, political and environmental factors that create the context of their communities'.⁴⁷ In particular therefore, it relates to how such factors heighten the likelihood of trafficking and trafficking related harms in the individual case.

Cameron and Newman argue that vulnerability factors in the context of human trafficking can be broadly seen within two categories, namely structural and proximate.⁴⁸ Structural factors include *inter alia*: poverty, discrimination, and attitudes towards particular practices. Proximate factors include weak law enforcement, corruption and the activities of criminal groups. Immediate factors might also be relevant and will include particular acts or experiences that will impact one's well-founded fear, such as attempts at trafficking. As will be seen below, State

⁴⁵ Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (Oxford University Press 2008) 13; Michele Anne Clark, 'Trafficking in Persons: An Issue of human security' (2003) 4 *Journal of Human Development* 247

⁴⁶ See broadly: UNODC, *Guidance Note on 'Abuse of a Position of Vulnerability' as a Means of Trafficking in Persons in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime* (United Nations Office on Drugs and Crime 2013)

⁴⁷ UNODC, *An Introduction to Human trafficking: Vulnerability, Impact and Action* (UNODC ed, UNODC 2008) 69

⁴⁸ Sally Cameron and Edward Newman, 'Trafficking in humans: Structural factors' in Sally Cameron and Edward Newman (Eds.) *Trafficking in Humans: Social, Cultural and Political Dimensions* (United Nations University Press 2008) 21

protection will only be sufficient if and when all of these circumstances are taken into account and adequately addressed.

A survey carried out by UNODC with practitioners identified the following broad vulnerabilities: age (youth, and to a lesser extent old age), irregular legal / migration status, poverty, precarious social status, pregnancy, illness and disability (mental and physical), gender (especially female and transgender), sexuality, religious and cultural beliefs (including practices around juju and voodoo), linguistic isolation, lack of social networks, dependency (on employer, family member, etc.), threats of disclosure to family or community, as well as abuse of emotional / romantic relationships.⁴⁹ These vulnerabilities are also played out in many of the cases assessed in the course of this research.

Domestic violence is another significant vulnerability factors raised in various cases. Gallagher draws a strong link between violence against women (more generally) and human trafficking, promoting measures towards combatting the former as a means towards achieving anti-trafficking goals.⁵⁰ Indeed trafficking is included within the definition of violence against women in the Declaration on the Elimination of all forms of violence against women.

Another critical vulnerability factor is the need or desire of the individual to migrate in search for better life opportunities abroad. Cameron and Newman consider trafficking to be a consequence of the so-called 'commodification of migration'. The UN Special Rapporteur on violence against women has described traffickers as

⁴⁹ See: UNODC, *Abuse of a Position of Vulnerability and Other "Means" Within the Definition of Trafficking in Persons* (UNODC 2013) 16

⁵⁰ Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 452

‘fishing in the stream of migration’. The desire to migrate will be a vulnerability factor to trafficking when coupled with desperation in one’s country of origin that leads to the likelihood of accepting risky arrangements. This will often result also if there are limited or no options for legal and safe migration.

In the context of child trafficking lack of registration and subsequent statelessness increases vulnerability to trafficking. Such children tend to already derive from situations of economic, social and political vulnerability and lack of registration worsens their already vulnerable position. Lack of registration may result in difficulties of identification, exclusion from social provisions, as well as barriers to various other opportunities including job prospects. Moreover, children who have not been registered will have greater difficulty accessing diplomatic and consular protection where and when needed.

Moving on to proximate causes of trafficking, political dynamics, and most notably weak governance structures, are often identified as critical vulnerability factors in the context of trafficking. Shahinian identifies the specific challenges faced by transitional democracies,⁵¹ whilst the impact of the collapse of the Berlin wall in the late 80’s on the trafficking of Eastern Europeans is now well documented.

These vulnerability factors will apply to individuals being recruited into trafficking rings as well as to retaining control over persons already within the situation. Moreover, some will heighten vulnerability to further harm especially in the post exit phase. Vulnerability factors will vary according to the social, cultural, legal and

⁵¹ Gulnara Shahinian, ‘Trafficking in Persons in the South Caucasus – Armenia, Azerbaijan and Georgia: New Challenges for Transitional Democracies’ in Sally Cameron and Edward Newman (Eds.) *Trafficking in Humans: Social, Cultural and Political Dimensions* (United Nations University Press 2008) 252

political context in the countries of origin (as well as countries of destination). They will also be influenced by the type of traffickers, the mode of intended exploitation, the demand for trafficked persons in countries of destination and the specific economic environment. For instance, the economic crisis has increased the demand for cheap labour abroad, making persons able to fulfil those roles increasingly vulnerable to being targeted by traffickers, whilst their own poverty, also impacted by the crisis, will reduce their options, thus increasing their desperation and thereby their inclination to accept risky work and migration options. Moreover, whilst women are more vulnerable to trafficking for sexual exploitation, men might be more vulnerable to labour trafficking in specific industries. Indeed, particular demands for particular types of sex workers heightens the vulnerabilities of specific communities, depending on their situation, racial or ethnic background, or other conditions. For instance, as will be seen below, the demand for 'virgins' increases the vulnerability of younger girls to trafficking and their vulnerability will also depend on their specific situation in the country of origin. Vulnerability will also be impacted by the availability or otherwise of State protection to the particularly individual or group.⁵²

Moreover, whilst specific issues can be identified, 'a multitude of factors operate to shape the context within which trafficking takes place and the capacity of the individual to respond'.⁵³ Indeed the risk of trafficking cannot be assessed by reference to any single indicator. Rather, trafficking results from a variety of factors that breach traditional boundaries, including global justice, human rights, governance and crime. Tackling it therefore requires comprehensive, cross-sectorial

⁵² This is an important consideration also in determining the question whether there is a Convention ground nexus to the persecution. This is an issue to which we return in Chapter 7.

⁵³ UNODC, *Abuse of a Position of Vulnerability* (n 45) 14

and integrated efforts. Whilst it is impossible to address all the issues that impact on vulnerability to and the potential of trafficking, this section outlines some of the most pernicious ones.

As suggested above there are correlations between human trafficking and a number of other factors namely: corruption, human development, gender inequality and human security. In part this section updates and expands a similar exercise by Zhang and Pineda⁵⁴ who tested for correlation between some indicators of poverty, the corruption perception index and human trafficking. The aim here is to highlight the relevance of a variety of indicators in proving that a fear of trafficking-related persecution is well-founded, and generally to underline the relevance of poverty, discrimination and corruption within the context of human trafficking and trafficking based asylum claims. Further to attempting a quantification of these correlations, a brief elaboration of the various ways in which each of these issues impacts on trafficking will be discussed.

Rather than making new hypotheses, this section aims to confirm, to the extent possible with existing data, the widely acknowledged (read: assumed) relationships among human development, human security, corruption and human trafficking.

⁵⁴ Sheldon X Zhang and Samuel L Pineda, *Corruption as a Causal Factor in Human Trafficking* (Springer 2008)

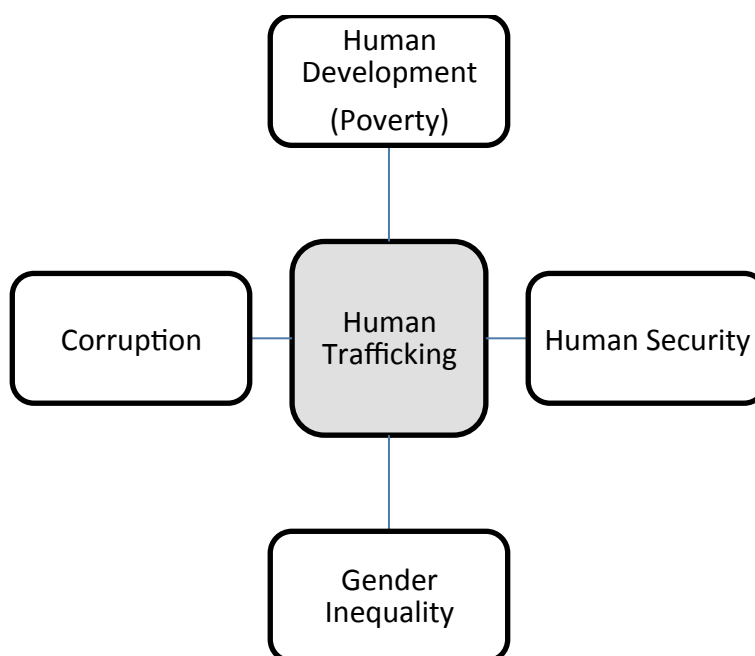


Figure 7: Determinants of Human Trafficking

Whilst there is growing acknowledgement in literature and case law of the links among the various issues, there is very little (hard) evidence of the link. This is in the large part explained by the lack of reliable data on the various ‘elements’, including trafficking itself.⁵⁵ Any attempt to identify correlations must necessarily disclaim itself as being based on existing indices, not all of which fit squarely with the specific research design. For instance, the measure of trafficking efforts is based on the Trafficking in Persons report rather than a country-by-country number of trafficked persons that remains unknown.

The following correlations are run on the basis of existing indices including: the human development index,⁵⁶ the gender inequality index,⁵⁷ the corruption

⁵⁵ See on this: Frank Laczko, ‘Data and research on human trafficking’ (2005) 43 International Migration 5; Aderanti Adepoju, ‘Review of research and data on human trafficking in sub-Saharan Africa’ (2005) 43 International Migration 75; Frank Laczko, ‘Human trafficking: the need for better data’ (2002) Migration Information Source; Alison Jobe, *The Causes and Consequences of Re-Trafficking: Evidence from the IOM Human Trafficking Database* (IOM Human Trafficking Database Thematic Research Series 2010)

⁵⁶ The Human Development Index developed by the United Nations aimed at the creation of a single statistic that serves as a frame of reference for both social and economic development. The index gives countries a score of between 0 and 1 depending on their level of human development with 0 reflecting no level of human development and 1 reflecting a high level thereof.

perception index,⁵⁸ the human security index,⁵⁹ and the United States Trafficking in Persons Report.⁶⁰ The data set is a list of 168 countries i.e. all the countries for which data exists under the relevant indices. The correlations are illustrated in figure 8 below:

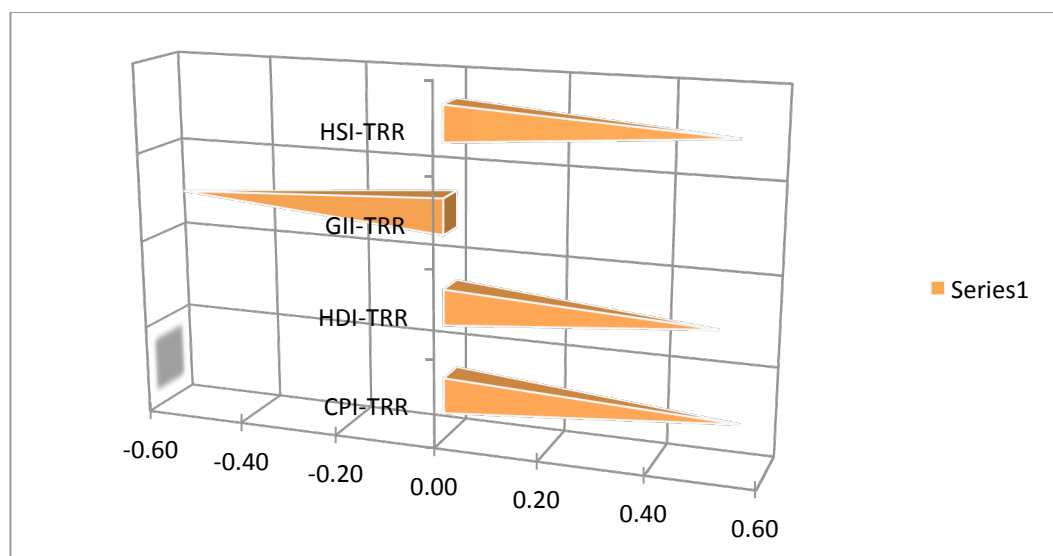


Figure 8: Correlations

Briefly, a positive correlation means that all things being equal, higher scores on one variable tend to be paired with higher scores on the other. A negative correlation means the opposite whereby lower scores on one index are coupled with higher scores on the other.

⁵⁷ The Gender **I**nequality Index (emphasis added) is part of the data utilised in drawing up the Human Development Index. It aims to present the difference in the distribution of achievements between women and men. It is based on three dimensions and five indicators.

⁵⁸ The corruption perception index is a product of Transparency International. It is a composite survey that rates countries according to how corrupt their public sectors are perceived to be by the general population of that country.

⁵⁹ UNODC, *Global Report on Trafficking in Persons 2012* (United Nations Publications 2012). The human security index is based on 3 core components namely the economic fabric index, the environmental fabric index and the social fabric index. It describes itself as an index of 30+ leading economic, environmental and social indicators.

⁶⁰ United States Department of State Trafficking in Persons report remains the only ranking available on the issue of trafficking and its use becomes a necessary evil for policy makers, decision takers and academics alike. The report ranks countries according to 4 'tiers. More information on the report is provided in Chapter 7 dealing with Procedural issues.

This exercise identifies a statistically significant positive relationship between the level of human development and the level of anti-trafficking efforts. That means that where there are higher levels of human development, there is also a better ranking in the Trafficking in Persons Report. Human development is concerned with individual well being and covers issues such as poverty and access to basic services. There is also a statistically significant positive relationship between the levels of perceived corruption and the levels of trafficking. That is, the higher the corruption in a country, the more likely it is that trafficking is more widespread and anti-trafficking efforts limited, whilst where corruption is curtailed; there are greater anti-trafficking efforts and lower levels of trafficking overall. Gender inequality has a negative relationship with trafficking efforts meaning that the less equal a society is, the more trafficking there is likely to be. The inverse is also true – greater equality between men and women means better efforts against trafficking.

Acknowledging these dynamics is important both in terms of general anti-trafficking policy and in determining trafficking based asylum claims. It reflects the links between legal, social and political issues and how trafficking related risks cannot be seen in abstract. It highlights the need to look for information on vulnerability to trafficking beyond the scope of the directly trafficking oriented sources. As will be noted in the procedures chapter, other sources, including the ones used in this exercise, should contextualise the determination and decision on whether one's fear of trafficking related persecution is well-founded. We now discuss some of the ways in which each of these issues impacts on trafficking. This is not an in depth or exhaustive discussion, but rather a brief overview of some of the most salient points.

3.3.1 Poverty

Poverty (objective and relative⁶¹) impacts on trafficking in a variety of ways, not least by increasing the attractiveness of opportunities abroad (often coupled with harsher entry requirements⁶²) and increasing the vulnerability of trafficked persons. The relevance of poverty as a vulnerability factor in the context of trafficking is acknowledged also in the trafficking instruments including Article 9(4) of the Trafficking Protocol which, as will be seen below, identified poverty as a factor that makes persons, especially women and children, vulnerable to trafficking. The Recommended Principles on Human Rights and Human Trafficking similarly reference poverty as a factor that increases vulnerability. As a UNICEF representative stated, poverty remains a ‘major and ubiquitous’ cause of child trafficking.⁶³ In the large part trafficking patterns flow from poor countries and areas to more affluent countries or areas although this is not always the case. The relevance of poverty is now also confirmed in the latest cases. In one of the earlier cases, and which constitutes an important benchmark in jurisprudence in this area, it was held in *SB Moldova* that:

the fact that Moldova is Europe’s poorest nation, taken in conjunction with other factors (such as family relations, lack of employment, lack of

⁶¹ The term Absolute poverty refers to a set standard which is the same in all countries and which does not change over time. An income-related example would be living on less than \$X per day. The term relative poverty refers to a standard which is defined in terms of the society in which an individual lives and which therefore differs between countries and over time. An income-related example would be living on less than X% of average UK income. Therefore one might not be objectively poor but poor in terms of the standards of his/her community. Source: The Poverty Site, ‘Relative versus absolute poverty’ (*The Poverty Site* 2013) . The issue of relative poverty is often discounted in terms of importance. It is, however, irrespective of one’s views on the issue, more broadly an important vulnerability factor in terms of human trafficking.

⁶² Visa and residence regimes tend to be significantly stricter with regard to individuals and groups coming from poorer backgrounds. A certain economic standing (often sufficient to ensure that one does not become a burden on the host community’s finances) is required for residence in most States. Moreover, visa facilitation programmes are often limited to States of similar economic standing.

⁶³ See: Cameron and Newman (n 47)22

awareness of the dangers of being trafficked as well as corruption, which enables traffickers to operate) go some way towards explaining the reasons why individuals are pressurised to, or feel compelled to, enter into arrangements which result in their being trafficked.⁶⁴

Poverty heightens vulnerability by reducing options and opportunities, increasing desperation and inclination to accept risky opportunities whilst at the same time disempowering individuals to extricate themselves from exploitative situations. Poverty induced vulnerability can be personal or familial, with, for example families 'selling' their children to traffickers as a way of making money or sending their children abroad to earn money for the family. As ILO research in Nepal found 'a family in desperate need for money is inclined to say yes, even without knowing the full nature and circumstances of the work'.⁶⁵

This is closely related to other issues including education and skills training. A number of cases assessed in the course of this research highlighted, how as a result of not having any marketable skills or having a low level of education, specific applicants would become destitute and socially excluded thereby increasing their vulnerability to trafficking. Poverty is therefore both a cause and a consequence of trafficking.

The human rights approach to poverty⁶⁶ underlines the multidimensional nature of poverty, describing poverty in terms of a range of interrelated and mutually reinforcing deprivations, and drawing attention to the stigma, discrimination, insecurity and social exclusion associated with poverty. This understanding is helpful

⁶⁴ *SB (PSG - Protection Regulations - Reg 6) Moldova v. Secretary of State for the Home Department*, CG [2008] UKAIT 00002, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 26 November 2007 Para 105

⁶⁵ IPEC, *Nepal Trafficking in Girls With Special Reference to Prostitution: A Rapid Assessment* (ILO 2001) 24

⁶⁶ For more on this see: OHCHR, *Principles and Guidelines on the Human Rights Approach to Poverty Reduction Strategies* (OHCHR, 2006)

in determining the causal relationship between poverty and trafficking as well as between poverty and refugee status.

Whilst the notion of poverty as a cause of trafficking is often cited, its backing is mainly anecdotal. There is little research to back up the claim even if it appears to be an obvious conclusion. Of greater concern is the fact that if poverty continues to be seen as a sole cause of trafficking, this is likely to negatively impact on efforts to combat trafficking simply because the issue becomes one that is too big to address. This is something to which we return briefly below when discussing the State's obligations in preventing trafficking.

3.3.2 Discrimination

Discrimination and inequality, whether based on race, gender or other grounds (or multiple grounds) impacts on vulnerability to trafficking in much the same way as poverty. As the OSCE Special Representative on Human Trafficking noted:

Discrimination is always mentioned as a root cause of trafficking. However, further analysis is needed to better understand the multiple ways in which discrimination can lead to victimisation in a trafficking pattern, regarding for example the personal, family and social background of actual and potential victims, or their belonging to a national or ethnic minority.⁶⁷

By reducing opportunities for employment, education and general progression it induces people to situations where they are more likely to accept risky transactions and situations leading them into exploitation. Different groups all too often have different access to resources as well as to protection and prevention measures. Traffickers also target different groups for different purposes and reasons.

⁶⁷ Maria Grazia Giammarinaro, Opening Address at the 12th Alliance against Trafficking in Persons Conference An Agenda for Prevention: Non-Discrimination and Empowerment Vienna, 11-12 October 2012

We return to the question of race and its relevance in the context of trafficking based asylum claims in chapter 6 when discussing Convention ground nexus. As will be shown there, race plays an important part in heightening the vulnerability to trafficking both directly (by for instance reducing employment options) and indirectly (through the failure of State protection). It is however pertinent to note that refugee law 'jurisprudence has now developed to a point where it is capable of encompassing a far wider range of claims relating both to work and other aspects of economic and social rights'.⁶⁸

3.3.3 Corruption

Corruption negatively impacts on the potential effectiveness of States' counter-trafficking initiatives and as such is a relevant factor in assessing whether one's fear of persecution is well-founded. The link between trafficking and corruption is now well acknowledged albeit under-researched and often overlooked.⁶⁹ Corruption refers to the use of public office for private gain.⁷⁰ This broad definition reflects the evolving nature of public service especially within the context of migration control. In an age where many public services are being contracted out to private entities it is no longer apt to rely on a definition of corruption that binds only 'officially' public officials. The focus here is on corruption related to trafficking.

⁶⁸ Michelle Foster, *International refugee law and socio-economic rights: refuge from deprivation*, vol 51 (Cambridge University Press 2007)

⁶⁹ Richards refers to there being 'a crucial lack of empirical data on the influence of corruption on labour trafficking'. See: Kathy Richards, 'The Trafficking of Migrant Workers: What Are The Links Between Labour Trafficking and Corruption?' (2004) 42 *International Migration* 147

⁷⁰ For discussions of some of the more nuanced definitions see: Michael Johnston, 'The search for definitions: the vitality of politics and the issue of corruption' (1996) 48 *International Social Science Journal* 321; John Gardiner, 'Defining Corruption' in Arnold Heidenheimer and Michael Johnston (Eds.) *Political Corruption: Concepts & Contexts* (Transactions 2009)

On the issue of corruption the court in *VXAJ* noted how certain issues will need to be shown by way of general context and not in the individual claims. Speaking about corruption in Thailand it noted that:

It would have been impossible for the applicant given her personal circumstances to appear before the tribunal and prove the existence of official State corruption in her particular case given that her circumstances appear to have involved endemic corruption among State officials.⁷¹

3.3.4 Intersections of Vulnerability Factors

The reality of human trafficking is that there is no single factor that alone explains an individual's vulnerability to trafficking. Whilst the example of some vulnerability factors has been elaborated above, this is not a definitive or, in any way, comprehensive list. It is more intended as a teaser of the type of issues at stake. Moreover, the various factors will interact and influence each other. For instance, poverty in a country will often be accompanied by low public sector wages making corruption a viable way for officials to bolster their income. Discrimination leads to lower job prospects and thereby on poverty. As such, vulnerability factors can be said to have a direct and/or an indirect effect on an individual applicant's well-founded fear.

All of these vulnerability factors are exploited by ruthless criminals who take advantage of the vulnerable situations of individuals and communities for their own personal gain. Traffickers take advantage of the (human) insecurity experienced by specific communities.⁷² All too often, the vulnerability of the trafficked persons' communities also means that traffickers are allowed to act with impunity and that

⁷¹ *VXAJ v. Minister for Immigration and Another*, [2006] FMCA 234, Australia: Federal Magistrates Court, 20 April 2006 Para 36

⁷² The notion of human security has not really made its way into discourse around refugee law

prevention and protection measures are weak and/or ineffective. Let us turn now to specific contexts where vulnerability is heightened. Two examples are given here. First, vulnerability to re-trafficking as a specific form of trafficking related harm that carries specific vulnerability factors. Second, we look at the issue of conflict and post conflict situations. The latter focus is justified considering ongoing situations in Syria and other places and the limited news emanating therefrom of trafficking affecting those displaced by these conflicts.

3.3.5 Vulnerability to Re-Trafficking

Past experiences of trafficking will also impact on the likelihood of re-trafficking in the future. Some courts have argued that indeed the experience of having been trafficked marks a change in circumstances by making the trafficked person wiser and thereby reducing the likelihood of re-trafficking. In *HC China*, for instance, the courts noted how the applicant:

Is now fully aware of the dangers in considering employment which offers to pay a considerable amount of money.⁷³

Similarly, in *MP (Romania)* the court held:

Knowing what she knows now it is inconceivable that she could be duped in the same way as most victims of trafficking.

In other cases however, the Courts have taken a more nuanced approach noting the heightened vulnerability to re-trafficking. Based on the research, and bearing in mind the evidence given in the various cases, the courts have acknowledged that having been trafficked not only doesn't reduce the risk of re-trafficking but rather heightens the risk. In *AZ (Thailand)* the court, relying on existing evidence, identified

⁷³ Para 84

the attractiveness of trafficked persons to traffickers. It noted:

It could be said that having been trafficked once, she would be wiser the next time round. However, the evidence indicates the opposite is the case, and that former victims of trafficking are even more vulnerable to re-trafficking because they have already been through the business and know how to be compliant. They are easier for traffickers to deal with as they do not have to be taught the rules from scratch; the 'breaking in' period has already taken place.⁷⁴

In *AM and BM (Albania)* the court noted how even where the return to the trafficker is 'voluntary' the impact of previous experiences influence the application of the definition. The court explained:

While it is arguable that the fact that women might act in that way would be likely to be a reflection of the psychological damage which has been done to them by being trafficked in the first place, in so far as it is their decision to be re-trafficked, then, taking into account the terms of sub-paragraph (b) of Article 3 of the UN Protocol we consider that such arrangements may still fall within the terms of the Protocol.⁷⁵

Research carried out by the International Organisation for Migration (IOM) found that the groups most vulnerable to re-trafficking are women, children and young adults, and that those trafficked as minors are often vulnerable to re-trafficking as adults.⁷⁶ It noted a heightened vulnerability to re-trafficking immediately after having exited a trafficking situation and en route to assistance, and that this usually occurs within two years of the primary trafficking. It is not uncommon for re-trafficking to be to a different country or for a different mode of exploitation whilst internal trafficking appears more likely than international trafficking.⁷⁷ The same research also identified that factors that increase vulnerability to re-trafficking include both the factors that render an individual vulnerable to trafficking in the first

⁷⁴ Para 150

⁷⁵ Para 146

⁷⁶ The gender and age dimension might be a result of the data bias in this research.

⁷⁷ Jobe (n 54)

place, as well as others relating to previous experiences of trafficking or to their experiences with assistance organisations. This is particularly interesting to the present research. Many of the cases reviewed in preparation of this chapter noted how the past trafficking experience would render the individual more susceptible to re-trafficking. Research indicates that unsupported individuals are more likely to be re-trafficked on their way back home.

The research also made another interesting finding, albeit with regard to a minority of cases, in noting the possible involvement of law enforcement officials in the re-trafficking process. This is again highlighted in a number of cases where corruption by law enforcement and immigration officials was quoted as posing a particular risk. In *AZ (Thailand)* the appellant repeatedly noted that she believed that her former trafficker (a British national) had ties to the immigration authorities in Thailand. Such involvement can be linked to the passing of information to traffickers or the provision of deceitful information to the trafficked person. Such involvement also indicates the inability or unwillingness of the State of origin to offer effective protection.

Davies identifies a link between forced return and re-trafficking, arguing that forcibly returning an individual to the same situation from which he/she was originally trafficked heightens the likelihood of re-trafficking.⁷⁸ Indeed return to situations of economic difficulties and problems with finding employment are also quoted as causes of re-trafficking in the assessed case law. Surtees identifies a clear link between re-trafficking and the failure or success of re-integration programmes as

⁷⁸ John Davis, 'Understanding and Explaining the Trafficking of Women from Albania to Lyon, France, 1998–2001' (2007) as reported in Alison Jobe *The Causes and Consequences of Re-Trafficking: Evidence from the IOM Human Trafficking Database* (International Organization for Migration 2010)

well as the continued threats from the 'primary' trafficker.⁷⁹ This is also confirmed in the case law. Lack of employment prospects might in itself not amount to a well-founded fear of persecution, but if it is likely to result in heightened vulnerability to re-trafficking then it becomes a pertinent consideration. Closely associated with this is the failure of various re-integration programmes which are either discriminatory themselves or which are otherwise prepared in a way likely to fail.

3.3.6 Conflict and Post Conflict Situations

We noted above that vulnerability could be personal or situational. One situation that significantly increases vulnerability to human trafficking is war and conflict. This occurs in a number of ways and for a variety of reasons including: the amplification of pressure from push factors, undermining the traditional support structures, encouraging or making high risk migration inevitable, providing favourable conditions for the expansion and operation of organised criminal groups and through the creation of new markets for traffickers including via the arrival of peacekeepers. In post conflict situations, shifts in criminal priorities will heighten the involvement of criminal organisations (potentially previously engaged with weapon smuggling and distribution) with human trafficking as the possibility for profits there increase.

Research into emergencies have noted an increase in human trafficking from situations of complex emergencies including Haiti, Somalia, Sudan, Afghanistan, whilst recent news items have focused on the trafficking of Syrian women and girls from camps in Jordan. As noted in Chapter 2 the number of Kenyan women

⁷⁹ Rebecca Surtees, *Second Annual Report on Victims of Trafficking in South-Eastern Europe* (International Organization for Migration 2005)

trafficked to the UK increased during the time of the conflict there. Moreover, refugee camps, often associated with conflict and post conflict situations, are also significantly vulnerable to trafficking as recent information coming out of the Al Zawhari camp for Syrian refugees has clearly illustrated.

This should therefore be considered by status determination authorities also in terms of its likely impact on an applicant's vulnerability to trafficking and the potential access (or lack thereof) to protection in that context.

3.3.7 Need for a Context Specific Determination

A context specific determination is always required as highlighted by varying references to different issues in different cases. A case by case determination is mandated by the basic principles of refugee law as well as by the factual manifestations of human trafficking around the globe. The issue of virginity is illustrative of this point. It is often argued in the literature, including both academic and policy reports, that virginity is a value added, as the price asked for sexual relations with a virgin is significantly higher in many countries, thus making their recruitment more profitable for traffickers. As research by the International Organisation for Migration with trafficked persons from Armenia found:

They had special interest in young virgins. They were selling them at enormous prices to rich Arab sheikhs for one night, after which they were working with clients like other ordinary girls.⁸⁰

Jones, in her research on trafficking for the purposes of forced marriage, found that 'it is no great leap in imagination to see that demands for youth and virginity lead to child bride trafficking' describing how, for instance, specific international marriage

⁸⁰ IOM, Trafficking from Caucasus: IOM Case Studies (International Organization for Migration 2009)

agencies specialised in ‘virgin Vietnamese girls without passports.’⁸¹ However, in other cases, the fact that an individual is considered ‘used’ is deemed to heighten her vulnerability to trafficking and that she is less likely to enjoy protection from traffickers. In *RRTA 727* for instance the applicant, who feared being trafficked by organised gangs for the purposes of organ removal and sexual exploitation noted that ‘as a used woman (not a virgin) she will have no protection from such gangs’⁸² whilst her representative is also reported as stating that ‘as a non-virgin the applicant would be given even less protection, and had a reduced chance of re-marrying’.⁸³

Part 4: State Protection

When and if a well-founded fear of persecution has been found based on the grounds discussed thus far, the second element of the test is whether there is sufficient state protection in the country of origin. One’s fear of persecution must be measured against the protection offered by the State of origin in determining whether it is well-founded. We now turn therefore to an assessment of State protection and the relevant measures that courts ought to consider. It must be noted that the issue of State protection will arise primarily in situations where the persecution feared is at the hands of a non-State actor of persecution.

⁸¹ Jackie Jones, ‘Trafficking Internet Brides’ (2011) 20 Information & Communications Technology Law 19, 22

⁸² *RRT Case No. 0903290*, [2009] RRTA 727, Australia: Refugee Review Tribunal, 4 August 2009 Para 21

⁸³ *Ibid* Para 32

There is a lack of clarity and inconsistency as to the conceptual relevance of state protection in refugee determination.⁸⁴ Lack of State protection is critical to the determination of refugee Status in three ways. First, it relates to the determination of whether fear of persecution is well-founded, arguing that State protection is the threshold and reality against which the well-founded nature of such fear must be determined. Fortin, for instance argues that state protection is relevant:

Only to the extent that the general ability of the State to ensure law and order is an essential factor for assessing the well-founded-ness of the person's fear of persecution by non-State agents.⁸⁵

The second argues that lack of state protection qualifies the definition of persecution. This is based on an understanding of persecution as serious human rights violations demonstrative of a failure of State protection.⁸⁶ A third posits that its relevance arises not from the requirement of a 'well-founded fear of being persecuted' but rather from the last component of the refugee definition which speaks of an unwillingness or inability to seek the protection of one's State of origin. This in turn is used to explain developments in the area of internal protection.

All three positions uphold the importance of State protection as an analytical backbone to the determination of one's refugee status.⁸⁷ This is especially so in the context of trafficking based asylum claims where in the most part, the 'traffickers' are non-state agents and are not acting on behalf, or for the interest of the State.⁸⁸

⁸⁴ Paul Mathew, James Hathaway and Michelle Foster, 'The Role of State Protection in Refugee Analysis' (2003) 15 *International Journal of Refugee Law* 444

⁸⁵ Antonio Fortin, 'The meaning of 'Protection' in the Refugee Definition' (2000) 12 *International Journal of Refugee Law* 548

⁸⁶ See Persecution Chapter (Chapter 4). See also: James C Hathaway, *The Law of Refugee Status* (Butterworths 1991)

⁸⁷ While this discussion is hosted within the broader chapter on 'well-founded fear', many of the issues discussed also apply in other contexts beyond the scope of the present chapter

⁸⁸ Whilst traffickers are non-state actors, it is important to note that the State retains some responsibility under international, regional and national human rights law to prevent trafficking

Assessing State protection in the context of trafficking is a challenging task. Whilst some matters are quantifiable and verifiable (such as, for instance, the existence of shelters) others cannot be easily measured. Data is limited and non-comparable, whilst some of the required measures (for instance combatting poverty) require commitments from both within and outside individual States as they raise issues of global justice.⁸⁹

Whilst it is accepted that there can be no expectation of absolute protection, there is disagreement in the case law regarding what the appropriate test might be. On the one hand there is the elimination of the well-founded fear of persecution test that looks at the resulting situation and determines whether the existing efforts bring the risk of persecution to below the threshold of 'real chance' that is the relevant threshold in refugee law claims. Under this test, protection is relevant only in so far as it results in fact in an mitigation of the risk to at least the well-founded fear standard. This is the protection approach which views refugee law as relevant in so far as State protection is not adequate. The more conservative view, is the due diligence standard which analyses the reasonableness of the home State's efforts as a sign of an ability and willingness to protect. It is here argued that this due diligence standard is appropriate for the determination of State responsibility, but is a dangerous and wrong test to apply in ascertaining protection needs. It requires a threshold that is too hard to prove for an asylum applicant. The latter is the accountability approach. Briefly, the accountability approach provides for protection

Moreover, the potential involvement of corrupt officials raises questions as to the degree of State involvement

⁸⁹ See generally on this: David Miller, 'National Responsibility and Global Justice' (2008) 11 *Critical Review of International Social and Political Philosophy* 383; For an overall assessment of State obligations see: Tom Obokata, *Trafficking of Human Beings from a HumanRights Perspective: Towards a Holistic Approach* (Martinus Nijhoff Publishing 2006); Gallagher, *The International Law of Human Trafficking* (n 49)

when the State of origin can be held accountable for the lack of protection. The former, on the contrary, provides for protection whenever the claimant has a well founded fear of persecution even if the States has tried to protect (but failed to provide sufficient protection).⁹⁰

Matthew, Hathaway and Foster⁹¹ articulate the serious risks associated with the application of the due diligence approach. The first is the resultant reliance on a 'blatant unwillingness to protect' standard which looks for concrete evidence of the State's unwillingness to offer protection. In practice, adhering to the 'due diligence' standard means that States will only offer protection when they can prove a blatant unwillingness of the State of origin to protect. This will be difficult to find in the context of trafficking where international pressure means that most States are keen to appear to be tackling the issue. Second, it denies protection to those who the State is in practice unable to protect despite good intentions and best efforts to do so. This might, for example, be the result of corruption or the size of the problem. The third is more conceptual in that the due diligence test effectively elides the two conceptually distinct notions of ability and willingness to protect whilst also bringing a standard from State responsibility into a discussion on protection.⁹²

As Refugee Appeal 71427/99 determined:

If the net result of a State's 'reasonable willingness to operate a system for the protection of the citizen is that it is incapable of preventing a real chance

⁹⁰ This is linked to the notion of surrogate protection which briefly means that a State will provide protection to an individual in the place of that individual's State of origin because the latter State has not provided the protection it was bound to provide to its citizens.

⁹¹ Mathew, Hathaway and Foster (n 82)

⁹² See: Mathew, Hathaway and Foster (n 82)

of persecution of a particular individual, refugee status cannot be denied that individual.⁹³

Put bluntly, whether a State wishes to protect means nothing to an individual being persecuted in practice. It is argued that this accountability approach (which aims to find responsibility for the State rather than merely a failure of effective protection) wrongly focuses its analysis around State protection on systems of protection rather than the ability of the system to protect.⁹⁴ Refugee status is based on having a well-founded fear of persecution, and if such well-founded fear can be determined then protection is due irrespective of the broader assessment of whether the State of origin has in fact adopted systems of protection. The assessment is not of the State's protection mechanism *per se* but of its effectiveness in reducing the individual applicant's fear to below the well-founded fear threshold.

Despite these concerns, courts have increasingly relied directly on actors relevant to the adjudication of state responsibility in applying the refugee definition. This is dangerous in the context of trafficking based asylum claims (as with various other asylum claims) where the agents of persecution are often non-state actors and where the vulnerability and risk is often not in the mainstream. Declared interest in combatting trafficking is therefore alone insufficient to minimize individual risk. The responsibility standard under the due diligence approach would take on the requirement of the ECHR to take immediate action when an individual is identified as being at immediate risk of trafficking. What if, however, no such alarm is raised? It is argued here that whilst the accountability approach is not the correct one in the determination of refugee status, there are various situations in which this higher

⁹³ Refugee Appeal No. 71427/99, New Zealand: Refugee Status Appeals Authority, 16 August 2000 Para 63

⁹⁴ Ibid Para 13 – this is the ground of appeal

threshold can also be met. This is especially the case where corruption plays a significant role in allowing trafficking to persist, or where in individual cases previous instances of attempted trafficking are not addressed. The risk however is that further to cases where it can be met, the courts will insist on applying this higher threshold thereby unjustly excluding some applicants from protection.

A discussion on the responsibility of States for trafficking will be undertaken in the next chapter (dealing with persecution) where it is argued that the State as an agent of persecution is not always as distant in trafficking claims as it is often argued. For present purposes, however, it is argued that when considering State obligations, it will often be possible to find the State responsible to some degree for the trafficking. We now turn to an assessment of what are States' obligations in the context of trafficking. Such obligations stem from the anti-trafficking instruments and the broader human rights framework, and reflect the legal inter-sectionality that underpins the determination of trafficking based claims.

3.4.1 State Obligations

This section briefly outlines the obligations of States in the context of trafficking as the basic measure against which State protection (and protection efforts) can be measured. As Obokata rightly notes, the development of international human rights law reveals that States have certain obligations with regard to trafficking committed by non-State actors, and consequently they can be held legally accountable.⁹⁵ What follows is not an exhaustive assessment of State obligations in the context of

⁹⁵ Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (n 87) 147

trafficking but rather an overview of some of the more pressing issues and obligations.

These obligations are further and beyond the general protection obligations States have toward their citizens⁹⁶ and are prioritised by virtue of their increased relevance to trafficking situations. Obligations arise generally from the human rights framework and specifically from the counter-trafficking instruments. The latter can be seen as tools for the implementation of the broader goals of ‘combatting human trafficking’ set out in the former. These obligations have also been outlined by the European Court of Human Rights as positive obligations under the Article 4 prohibition of slavery, servitude and forced labour.

Unlike the provisions examined in Chapter 2, the relevant provisions in this context are not the obligations relating to the protection of trafficked persons in the country of destination (or a third country as the case may be) but on the State of origin in combatting trafficking and further exploitation. These obligations will be divided into three broad sets: criminalisation, protection and prevention. Each will be addressed in turn.

3.4.1.1 Criminalisation, Investigation and Punishment of Trafficking

The duty to prohibit and punish trafficking emanates both from the anti-trafficking instruments themselves and from the broader human rights framework. The criminalisation of trafficking (including attempt, complicity, aiding and abetting and

⁹⁶ Some of the general obligations include law and order, rule of law and the duty to protect human rights more generally. As Piotrowicz rightly notes trafficked persons have rights not because they are trafficked by criminals or because they are non-citizens but because, irrespective of their immigration status they have human rights entitlements by virtue of being human beings within the jurisdiction of the State. See: Ryszard Piotrowicz, ‘The Legal Nature of Trafficking in Human Beings’ (2009) 4 Intercultural Human Rights Law Review 175

corporate liability) is required by Article 5 of the Protocol,⁹⁷ Article 18 of the COE Convention,⁹⁸ Articles 2 and 3 of the EU Directive⁹⁹ and Article 3 of the SAARC Convention.¹⁰⁰ It is also implied in the broader prohibition of trafficking under general human rights instruments, including the EU Charter, CEDAW, the CRC and the ILO Conventions. The ECHR has also determined that it is an obligation that stems from the general prohibition of slavery, servitude and forced labour. Substantial progress has been reported in this regard. The UNODC Reports how:

More than 90 per cent of the 162 countries and territories covered by the present report have specific legislation covering fully or partially all or most forms of trafficking in persons.¹⁰¹

In countries where no legislation prohibiting trafficking has been enacted, it would be relatively straightforward for an asylum applicant to show that adequate measures have not been implemented. Such straightforward cases are however limited and indeed none of the cases assessed throughout this research have raised this as a specific issue.

However having a legal framework that creates the offence of trafficking or related offences alone is insufficient to prove that one's fear of trafficking related persecution is not well-founded. Legal developments need to be accompanied by an administrative law framework, and an institutional culture willing and able to

⁹⁷ Article 5 (entitled: criminalisation) provides that: 'Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in Article 3 of this Protocol, when committed intentionally'. The Protocol also requires the criminalisation of attempt, complicity and instruction to commit trafficking (Article 5(2))

⁹⁸ Similarly to the Protocol, Article 18 of the Convention (entitled Criminalisation of trafficking in human beings) provides that: Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct contained in Article 4 of this Convention, when committed intentionally. Article 21 deals with attempt and aiding and abetting whilst Article 22 provides for corporate liability

⁹⁹ Article 2 (entitled: offences concerning trafficking in human beings)

¹⁰⁰ SAARC Convention Article 3

¹⁰¹ UNODC, *Global Report on Trafficking in Persons*, (United Nations 2012) 83

adequately implement the relevant legal provisions ensuring that traffickers and their associates do not enjoy effective impunity for their crimes. Assessing the protection potential of the country of origin therefore requires Courts to assess issues such as the capacity of the relevant authorities in terms of money, human resources and competence and the way related issues such as corruption are addressed. Whilst most States have indeed criminalised trafficking to different degrees, there remains a great lack in terms of the number of cases prosecuted and traffickers punished with the levels of prosecutions remaining worryingly low in most countries. This is attributed to a number of factors, including the unwillingness to push these cases forward, the reluctance of trafficked persons to partake in the prosecution, as well as the 'effective impunity' with which traffickers operate in particular countries. All of these issues need to be addressed in determining whether the State of origin is indeed able and willing to offer effective protection to the asylum seeking trafficked person.

3.4.1.2 Preventing Trafficking by Addressing its Causes

The obligation of States to address the root causes of trafficking is now well established in the anti-trafficking instruments. Article 9(4) of the Protocol requires States to take or strengthen measures to alleviate the vulnerability factors to trafficking including poverty under-development and lack of equal opportunities. Similarly, Article 5 of the COE Convention, Article 18 of the 2011 Directive and Article VIII of the SAARC Convention make similar requirements. Considering their relevance in the determination of trafficking based asylum claims, we now address some of the most pertinent obligations relating to poverty eradication, discrimination and corruption.

Poverty and Under-Development

We noted above that poverty is a key cause of human trafficking. A key difficulty in dealing with poverty in this context however is that of determining where the obligations rest. Whilst a number of international goals and standards have been set, poverty is an issue of global justice, calling into play the responsibility of the international community. Indeed the International Covenant on Economic, Social and Cultural Rights provides for international cooperation in the achievement of the goals it set. Article 2(1) provides that:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Trafficking based asylum claims are an instance where deprivation of social and economic rights can be causally related to ‘serious harm’. This, however, is not required. As Foster notes decision makers have now recognised that there is no necessary correlation between the nature of harm and the gravity of the impact on the individual and that the assessment of risk of persecution can be carried out on the basis of an accumulation of all harm feared, even if some elements of that feared harm would not individually be sufficiently severe.

Action against poverty is mandated, *inter alia*, by the Trafficking Protocol. Article 9(4) requires States to undertake, or strengthen, measures, including through bilateral and multilateral cooperation to alleviate factors that make persons vulnerable to trafficking, including poverty and underdevelopment. The OHCHR Principles and Guidelines promote the development of programmes offering

livelihood options, including basic education, skills training and literacy.¹⁰² Some of the specific measures to address poverty and inequality are of greatest relevance to efforts against trafficking, including: improving education opportunities, improved access to credit, finance and productive resources especially for women, removing de jure or de facto barriers to employment for vulnerable women, and ensuring rights to and within employment including minimum wage and adequate standards of living. In practice, this refers to a significant number of social and economic rights. Programmes aimed at rehabilitating trafficked persons into the community ought to address these needs and indeed sometimes do. The existence, accessibility and effectiveness of these programmes should be a critical consideration in determining whether one's fear of trafficking related persecution is well-founded. Let us now turn to the issue of discrimination.

Discrimination

Discrimination on various grounds lies at the heart of trafficking, and States therefore have an obligation to combat discrimination as a way of addressing the causes (and consequences) of trafficking. As the preamble to the 2011 Directive stipulates:

Member States are bound by obligations under instruments of international law to which they are party, including in particular those that prohibit discrimination.

The Trafficking instruments themselves also make a number of requirements in this regard. Under the Trafficking Protocol, States are required to take or strengthen measures aimed, inter-alia at combatting lack of equal opportunities. Under measures aimed at combatting demand for trafficking, the COE Convention speaks

¹⁰² OHCHR Guideline 7(2)

of education campaigns in schools addressing gender discrimination.¹⁰³ Equality is a fundamental right enshrined in all human rights instruments whilst specific provisions and measures are set out in CEDAW¹⁰⁴ with regard to sex discrimination and ICERD¹⁰⁵ with regard to racial discrimination. State obligations include, *inter alia*, ensuring equal access to healthcare, food, housing and education. CEDAW defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination. Measures mandated by the Convention include incorporating the principle of gender equality through the legal system and removing discriminatory provisions from the existing law, establishing public institutions to oversee and enforce this equality principle and to ensure the elimination of discriminatory acts whether by State officials or private persons. Article 6 of the Convention makes specific reference to trafficking (albeit restrictively understood) in providing that:

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

State efforts under the Convention can be assessed in part by reference to reports submitted to the CEDAW Committee¹⁰⁶ and to the country specific determinations of the same committee. In different countries various NGOs and other entities have also taken an active role in measuring discrimination on various grounds, sometimes through the preparation of shadow reports.

¹⁰³ Article 6(d) provides: 'To discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking, each Party shall adopt or strengthen legislative, administrative, educational, social, cultural or other measures including preventive measures, educational programmes for boys and girls during their schooling, which stress the unacceptable nature of discrimination based on sex, and its disastrous consequences, the importance of gender equality and the dignity and integrity of every human being'

¹⁰⁴ Convention on the Elimination of all Forms of Discrimination against Women

¹⁰⁵ International Convention on the Elimination of Racial Discrimination

¹⁰⁶ The committee is set up by virtue of article 17 of the Convention

Assessing the State of origin's efforts in combatting discrimination provides an important tool in determining whether one's fear of trafficking related persecution is well-founded. Whilst alone insufficient, it is an important pillar in the country framework for combatting human trafficking and should therefore be an important consideration for status determination authorities.

Corruption

Much like trafficking more generally, looking at the issue of corruption in the context of asylum claims highlights the inter-sectionality between various instruments of international law, with the Convention Against Corruption being a primary point of reference. The trafficking Protocol makes reference to the potential involvement of public officials in trafficking, and whilst it does not directly mention trafficking the indirect reference is clear. State obligations under the Corruption Convention include: the development and implementation of effective anti-corruption policies, ensuring the existence of a body or bodies tasked with the prevention of corruption, the development of measures for curtailing corruption in the public sector, the development of codes of conduct for public officials promoting integrity, honesty and responsibility, establishing appropriate systems for public procurement and management of public finances, and to take measures aimed at preventing corruption involving the private sector.

Adherence to these measures will provide an indication of the States' efforts to combat corruption (and thereby curtail one of the opportunities available to traffickers). As noted previously with regard to the trafficking instruments, *bona fide* adherence to the provisions of the Convention will only go some way to determining the extent of corruption within the particular State. It does however provide a

benchmark against which measures such as investigations and prosecutions can be measured.

A relevant query is whether States can be held accountable for the action or inaction of corrupt officials. The articles on State responsibility imply that even when corrupt officials act beyond the scope of duty, their actions can be attributed to the State. Where such attribution can be proven, the State becomes party to the agents of persecution. Even where this is not the case, however, the protection available to trafficked persons will still be compromised. We return to this point in the next chapter in arguing that States may be held responsible for a wider spectrum of trafficking cases.

The cases assessed for the purposes of this research clearly identify the relevance of corrupt officials to the finding of a well-founded fear. If officials in a State are known to be corrupt and to work with traffickers, there is a heightened risk that traffickers will be able to track the applicants and harm them. This, besides the justification for the individual applicant's fear which may also mean that the applicant will be hesitant, or refuse, to report instances of attempted trafficking or other forms of harassment to the police. Other forms of harm involving public officials may include: threats to the trafficked persons and their families, informing traffickers of the return, and turning a blind eye to retribution and re-trafficking. This was a critical issue in *AZ (Thailand)* where the facts of the case indicated that the trafficker had very good connections within the border guards and that these connections were a vital asset to his criminal enterprise. In *HC and RC (China)* the UK courts clearly identify the lack of a determined effort to deal with the complicity of corrupt law enforcement officers and state officials as a principal deficiency in China's anti-

trafficking measures. The case dealt with the issue of corruption in some detail, arguing, as will be further developed in the next chapter that levels of corruption meant that trafficking was tolerated, or even encouraged by the State officials. The court quoted a researcher to the effect that:

Corrupt law enforcement officers and government officials were a barrier to combatting prostitution and trafficking. Officials were bribed by pimps or brothel owners or offered perks when they themselves visited the brothel. These actions indicated the silent encouragement of prostitution and, intentionally or not, trafficking.¹⁰⁷

The failure to address corrupt practices in relevant entities will therefore indicate a failure on the part of the State to adequately address human trafficking, and in some cases may be seen as encouraging the same.

Other Measures

Besides the measures at the macro level, the anti-trafficking instruments also require States to undertake preventative measures based on research, information and awareness raising, education campaigns, social and economic initiatives and training programmes. Similar provisions are also found in the CoE Convention¹⁰⁸ and in the 2011 Directive. In the development, implementation and assessment of these measures, the CoE Convention requires States to promote a rights based approach including the use of gender mainstreaming and the application of a child sensitive

¹⁰⁷ *HC & RC (Trafficked Women) China v. Secretary of State for the Home Department*, CG [2009] UKAIT 00027, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 18 July 2009 para 21

¹⁰⁸ Article 5(2) provides that: 'Each Party shall establish and/or strengthen effective policies and programmes to prevent trafficking in human beings, by such means as: research, information, awareness raising and education campaigns, social and economic initiatives and training programmes, in particular for persons vulnerable to trafficking and for professionals concerned with trafficking in human beings'

approach.¹⁰⁹ An advantage to such measures is the possibility of measuring efforts, being able to consider how many training sessions were held, and how many people were trained. Conversely however the impact of such measures is sometimes difficult to measure.

The vast majority of cases assessed for the purposes of this research, dealt with the possibility of re-trafficking or further exploitation upon return. This raises the importance of assessing the availability and effectiveness of specific efforts towards the re-integration of trafficked persons. These will include the provision of shelters, education programmes, access to the labour market and recognition of skills. The threshold to measure such efforts should be the effective accessibility of these measures to the individual applicant.

There is some relevance of 'higher standards' emanating from soft law instruments most notably the OHCHR Guidelines on human rights and human trafficking. It would be relatively easy for a court to find in favour of State efforts when such higher standards, beyond the strict legal requirements are adhered to in the State of origin. This is, not least, based on the impression that arises from such adherence, that the State is willing and trying to combat trafficking. The efficacy of such measures must however also be considered as this is the only way that their impact on reducing the risk of further harm can be addressed.

109 Article 5(3): 'Each Party shall promote a Human Rights-based approach and shall use gender mainstreaming and a child-sensitive approach in the development, implementation and assessment of all the policies and programmes referred to in paragraph 2'

3.4.2 State Protection in the Individual Case

In *VXAJ* an important issue was raised. The Australian Court determined that the tribunal had erred in only looking at the situation of non-Thai women being trafficked into Thailand but failing to take due consideration to the real risks faced by Thai women in Thailand. The primary point of reference in this context should be the protection of nationals of the State even if the general trafficking scenario will be a relevant consideration. Therefore, a State that has put in place measures for the identification and protection of foreign nationals trafficked into the country but fails to address the trafficking of its own nationals might fall short of reducing the risk of trafficking related persecution below the well-founded fear threshold.

Whilst the conception of ‘well-founded’ appears to project discourse around the State of origin rather than the individual, there are various characteristics of the individual which will have a significant impact on the risk of persecution, that is in determining whether the fear is well-founded or not. This is reflected in Article 20(3) of the Qualification Directive that provides that:

3. When implementing this Chapter, Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence. (Emphasis added)

Various of the conditions mentioned in this provision will apply, to varying degrees to trafficked persons and the recognition of the specific vulnerability of trafficked persons is explicitly recognised through their specific mention.

In *AM and BM (Albania)* the court found that in relation to the question of sufficiency of protection:

We conclude that, for each individual it is necessary to make an assessment taking into account the particular factors of that individual.¹¹⁰

Some of the factors that courts have identified in this regard include: skills likely to promote employability, levels of education, gender, age, trauma, the possibility (or otherwise) of returning to one's original social environment and the availability of family support. In various cases the courts have relied on some of these factors as signs of potential vulnerability to re-trafficking and further exploitation. The vulnerabilities created by these factors will be further aggravated by the onset of trauma and stigma resulting from the trafficking experience.

In *MP (Romania)* it was argued on behalf of the appellant that the adjudicator had failed to consider sufficiency of protection in the context of the appellant's individual needs. This raises the issue of specific vulnerability in the context of trafficking and the notion that there is an individual assessment which must be carried out in determining whether one's fear is well-founded or not. In *AM and BM Albania* the court noted how:

Whether they are at risk of persecution on account of such membership and whether they will be able to access sufficiency of protection from the authorities will depend upon their individual circumstances including but not limited to the following: 1) The social status and economic standing of the trafficked woman's family. 2) The level of education of the trafficked woman or her family. 3) The trafficked woman's state of health, particularly her mental health. 4) The presence of an illegitimate child. 5) The area of origin

¹¹⁰ *AM and BM (Trafficked women) Albania v. Secretary of State for the Home Department*, CG [2010] UKUT 80 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 18 March 2010 Para 182

of the trafficked woman's family. 6) The trafficked woman's age.¹¹¹

Particular weight must therefore be given to the mental state of a victim of trafficking not only when considering whether or not a victim of trafficking might face persecution in her home area but also when considering issues such as internal relocation or her Article 8 rights.

This is linked to the question of individual vulnerability to trafficking or re-trafficking as the case may be. Vulnerability as susceptibility to trafficking ought to be distinguished from 'abuse of vulnerability as a means of trafficking'. The latter is one of the means set out in the Protocol and other anti-trafficking instruments. The former, of greater relevance to the present discussion, refers to the inherent environmental or contextual factors that heighten the exposure of an individual or group to trafficking in persons. Research carried out by the UNODC noted that:

Vulnerabilities commonly cited by practitioners interviewed for the survey included: age, poverty, precarious social status, pregnancy, illness and disability, gender, sexuality, religious and cultural beliefs, linguistic isolation, lack of social networks, dependency, abuse of romantic or emotional relationships.¹¹²

Other contextual elements include low levels of human security and refer to issues of poverty, inequality, discrimination and gender-based violence. The vulnerabilities are only exasperated in the context of individuals who have already been trafficked.

Family members can play a myriad of roles in the context of human trafficking. Whilst in some cases they are agents of persecution, they can also support the individual upon return. They can not be considered as agents of protection, however, the existence of family members willing to protect the applicant will form

¹¹¹ Ibid, Para f

¹¹² UNODC, 'Abuse of a Position of Vulnerability' (n 45) 16

part of the individual characteristics likely to impact on the vulnerability of the individual and the likelihood that existing protective measures will be available and accessible to the individual applicant.

In situations where ostracism and ensuing vulnerability is claimed,¹¹³ courts ought to consider also the availability and effectiveness of rehabilitation programmes as well as prospects of effective re-integration into the community. Rehabilitation programmes will include the availability of services (including, but not limited to, psychological services) and in some cases shelters for those who have been trafficked. Re-integration potential refers to the longer-term scenario of the person effectively functioning in the community where she lives in a manner likely to overcome some of the vulnerabilities. Re-integration prospects are sometimes supported through voluntary return programmes that are sometimes available to trafficked persons.¹¹⁴ Such programmes include assistance in the acquisition of skills and the start-up of business ventures and can significantly mitigate some dimensions of vulnerability. Anti-trafficking instruments make specific mention of the need for rehabilitation most notably the SAARC Convention that spares a great deal of attention to this issue.

3.4.3 Agents of Protection

The Qualification Directive highlights how it is only States or entities performing state-like functions that can be actors of protection. However many of the cases

¹¹³ It will be argued in Chapter 4 – Persecution, that one of the various forms of persecution feared by trafficked persons is ostracism by the family and the community which builds on but also contributes to exclusion and discrimination heightening the vulnerability of individuals to further harm including increased vulnerability to trafficking

¹¹⁴ See for example:

http://www.iom.fi/index.php?option=com_content&view=article&id=192&Itemid=184 [last accessed: 5 October 2013]

reviewed for the purpose of this research have paid considerable attention to the protection potential that comes from family members as well as services offered by NGOs. It is premised that whilst family members and NGOs can be part of the protection framework by reducing the risks in an individual case, they can never be considered as agents of protection as they are not in a position to:

Take reasonable steps to prevent the persecution or suffering of serious harm, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and that the applicant has access to such protection.¹¹⁵

In many cases assessed the courts noted how particular services were offered by NGOs and considered this to be part of the protection framework in the country of origin. This is problematic on two accounts. The first is the lasting nature of such services and the second relates to access. NGO services do not have the requisite durability and permanence to allow them to form part of the protective framework. Moreover, they do not reflect the State's efforts but rather the efforts of specific individuals within the State. They are also under no legal obligation to provide access to their services to everyone. The situation changes slightly when the service is offered in collaboration or on behalf of the government. Indeed this form of collaboration is encouraged in the various legal instruments.

In *SB (Moldova)*, it was argued for the appellant that the government relies heavily on the efforts of non-governmental organisations (NGOs), who cannot be regarded as actors of protection under Regulation 4 of the Protection Regulations. In *Streanga*, the Canadian court, having regard to existing case law highlighted that:

¹¹⁵ Qualification Directive, Article 7

The jurisprudence does not require an applicant to seek protection from non-state actors, such as NGOs, who cannot be expected to provide the actual protection from agents of persecution that the police should be providing.

Similar arguments were raised on behalf of applicants and by the courts in various other cases.

3.4.4 Internal Protection

The EU Qualification Directive allows States to deny international protection to individuals who, whilst facing persecution in their part of the State of origin, would either not face the same persecution, or would be protected, in another part of the State. This is of particular relevance in the context of trafficking based asylum claims where the agent of persecution is not the State. Courts have often argued that the applicant would be safe in other parts of the State, where the trafficker does not have contacts. This might be the case in some specific situations; however a number of issues must be addressed. First, in a context where the trafficker is part of a larger criminal network, or simply has contacts across the country or in specific entry points to the country, moving to another part of the State might not result in avoiding persecution. Second, moving to a different part of the State of origin could increase vulnerability to trafficking due to isolation from social circles. This will be aggravated where trafficked persons are traumatised. The application of the internal protection alternative ought therefore to be addressed carefully on a case by case basis.

Part 5: Concluding Remarks

This chapter has highlighted a number of important points regarding establishing well-founded fear in the context of trafficking based asylum claims. First, the determination needs to take into account past experiences of trafficking related harm, including past trafficking, attempts and threats, and to assess these within the context of the country of origin. Second, a number of specific vulnerability factors, both structural and proximate, should also inform the discussion both in terms of the likelihood of trafficking related persecution occurring in the first place or repeating itself. Issues of poverty, discrimination and corruption are also particularly important in this context however; any determination must carefully address the interstices between all of these. Specific issues and situations heighten vulnerability, including situations of conflict and post conflict, as well as having already been trafficked. All of these factors must necessarily be assessed within the specific context as highlighted by the different vulnerabilities associated with virginity discussed in part 3 of this chapter. If one can show that there is a well-founded fear of persecution (defined as expectation of harm rather than trepidation), the assessment must then move to the discussion of State protection and an assessment of whether, especially in the context of a fear of persecution from non-state actors, the State is able to offer protection of the kind likely to bringing the threshold of risk to below the well-founded fear threshold. State protection will be assessed in part against the requirements that emanate from the counter-trafficking instruments, as well as their practical implementation and impact. Moreover, other areas of law and policy, including for instance equality legislation, poverty-eradication strategies and legislation around corruption, will help inform that decision. Courts have relied

heavily on the protection framework that may arise from the family situation as well as the services offered by NGOs. This is problematic considering that under refugee law, and specifically under the Qualification Directive, it is only the State, or entities exercising State like functions, that can be actors of protection. Finally, whilst courts have the option of rejecting protection claims on the basis that protection is available in another part of the country of origin, significant attention must be paid to the likely impact of such a move, including on the vulnerability of the individual to further harm, including trafficking related harm.

Chapter 4: Persecution

This chapter assesses the application of the notion of persecution to trafficking based asylum claims. It seeks to outline some of the over-arching issues in the area including the type(s) of persecution faced or feared, the agents of that persecution, the timing thereof, as well as the place where such persecution must have taken place or be feared to take place. This discussion will help identify trafficking based asylum claims as a compartmentalised subset of asylum claims with some peculiarities not often found in other claims. These include the possibility of past persecution having taken place in the country where asylum is being sought, amongst other things.

The discussion in this chapter must necessarily be read in conjunction with the discussion in the previous chapter that assessed, *inter alia*, issues around vulnerability to trafficking and other trafficking related harms. The agents of persecution will impact on the discussion on the relevance of State protection whilst persecution experienced at different times will impact on the relevance of the discussion around well-founded fear (past persecution will create a presumption of a well-founded fear whilst in some cases persecution may be considered as continuing thus eliminating the requirement of that assessment altogether).

The core claim of this chapter is that the nature and scope of trafficking related persecution 'are such that harm is inflicted by multiple actors across a temporal and geographical continuum'.¹ Human trafficking is, as the UNHCR eloquently presents

¹ Anna Dorevitch and Michelle Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-trafficking Victims under Australia's Migration and Refugee Law' (2008) 9 Melbourne Journal of International Law 40

it: 'a process comprising a number of inter-related actions rather than a single act at a given point in time'.² This chapter will therefore argue that: human trafficking as well as various of its constitutive elements are persecutory in nature, that in some cases the on-going impact of trafficking amounts to continuing persecution, and finally that even in some situations of non-State actors of persecution, an element of State responsibility can also be established in applying the Articles on State Responsibility of the International Law Commission.³

This chapter is organised as follows. Part one provides a general overview of persecution under international refugee law. Part 2 focuses on the manifestations of persecution in the trafficking context. In particular it argues that trafficking qua trafficking, as defined in the Protocol, amounts to persecution for the purposes of refugee law. Part 3 looks at the trans-nationality of persecution in trafficking based asylum claims reflecting how refugee law protects against a well-founded fear in the country of origin and how issues around trafficking can be linked back to the country of origin even if the main part of the exploitation might have taken place in the country of asylum or in a third country. Part 4 deals with the timing of persecution. Further to highlighting the forward-looking focus of refugee law, it analyses in depth the relevance of past experience of trafficking and highlights the possibility of continuing persecution. Part 5 focuses on agents of persecution, postulating that even when the traffickers are non-State actors, the relevance of the State should not be understated and discussing the relevance of this connection. Part 6 concludes in arguing that whilst trafficking based claims have benefited from progressive

² UNHCR, 'The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked' (UNHCR 2006), para 10

³ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1

interpretations of the Geneva Convention definition, many trafficked persons could also be protected had a more restrictive interpretation been adopted.

Part 1: Persecution Defined and Described

The notion of persecution is a *sine qua non* of international refugee law⁴ but its definition remains elusive.⁵ The intentional lack of a normative definition⁶ allows for a context specific⁷ and progressive interpretation,⁸ but this comes with the associated risk of inconsistent jurisprudence⁹ and potential for States' own re-definition of their obligations.¹⁰ This in turn is fettered by the obligation of States to interpret international treaties in good faith,¹¹ developments in international¹² and transnational law¹³ as well as the interpretive guidance that can be found in other

⁴ See: James Hathaway, *The Law of Refugee Status*, (Butterworths, 1991); Andreas Zimmermann and Claudia Mahler, 'Article 1 A, para. 2 - Definition of the Term Refugee' in Andreas Zimmermann, Jonas Dörschner and Felix Machts (eds), *The 1951 Convention relating to the status of refugees and its 1967 protocol: A commentary* (Oxford University Press 2011)

⁵ James Hathaway, *The Law of Refugee Status* (n 4); Satvinder Juss, 'Human Trafficking, Asylum and the Problem of Protection' in Satvinder Juss (ed), *The Ashgate Research Companion to Migration Law, Theory and Policy* (Ashgate 2012)

⁶ See James Hathaway, *The Law of Refugee Status* (n 4); Paul Weiss, *Nationality and Statelessness in International Law* (Sijthoff 1979); James Hathaway, 'Reconceiving refugee law as human rights protection' (1991) 4 *Journal of Refugee Studies* 2; Vigdis Vevstad, 'Refugee protection' A European Challenge (Norwegian Refugee Council 1998); Atle Grahl-Madsen, *The status of refugees in International Law* (1966); Guy Goodwin-Gill and Jane McAdam, *The refugee in international law* (Third Edition edn, Clarendon Press Oxford 2011)

⁷ Context here refers to both time and place as well as to the general legal developments in international law

⁸ The lack of definition provides 'a strong indication that, on the basis of the experience of the past, the drafters intended that all future types of persecution should be encompassed by the term' and that the Convention 'should afford continuing protection for refugees in the changing circumstances of the present and future world.' See: James Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press 2005) 67

⁹ See in this regard: Goodwin-Gill and McAdam (n 6) 91; Matthew Price, *Rethinking Asylum: history, Purpose and Limits* (Cambridge University Press 2009) 103; Heaven Crawley, *Refugees and Gender* (Jordans 2001); Mahler and Zimmermann (n 4) 345-354

¹⁰ See Francesco Maiani, 'The Concept of "Persecution" in Refugee Law: Indeterminacy, Context-sensitivity, and the Quest for a Principled Approach' in Cavaille' (ed), *Les Dossiers de Grihl* (2010). Maiani argues that 'if the concept of persecution could be expanded or narrowed at will, then States would be at liberty to re-define the scope of their obligations as they see fit'. Para 2.

¹¹ Vienna Convention on the Law of Treaties

¹² In Refugee Appeal No. 74665/03, the New Zealand Court found that there are three approaches to defining the term refugee and that the one best suited is by looking at international human rights law

¹³ The reference being made here is broader than developments within human rights law and can be taken to refer to issues such as international criminal law and international humanitarian law where a

courts¹⁴ and in the work of international organisations most notably the UNHCR. A spectrum of soft law instruments have been produced addressing various issues and at various levels. The UNHCR handbook and guidelines¹⁵ are the critical example, however similar developments can also be noted at national level in various jurisdictions.¹⁶ Foster reflects on the need eschewed by case law for an external barometer of persecution allowing for a consistent and uniform interpretation and highlighting the dangers of a subjective approach.¹⁷

A number of regional and national legal developments have sought to elucidate the concept of persecution for the purposes of refugee law,¹⁸ whilst the term itself has also been defined in other areas of law.¹⁹ The EU Qualification Directive²⁰ speaks of acts of persecution describing these as acts that constitute a severe violation of basic human rights.²¹ It provides a list of acts that fit this criterion including acts of

number of important relevant developments have occurred. These include, at the minimum, the fact that trafficking is considered to be enslavement within the context of crimes against humanity according to article 7 of the Rome Statute of the International Criminal Court

¹⁴ Goodwin Gill has argued, and the author agrees: 'that states, interpreting and applying the 1951 Convention relating to the Status of Refugees through their legislation, courts and tribunals, ought to have some regard to relevant case law from the jurisdictions of other states party to the Convention'. See: Guy Goodwin Gill/H. Lambert (eds.), *The Limits of Transnational Law: Refugee Law, Policy Harmonisation and Judicial Dialogues in the European Union* (Cambridge University Press 2010)

¹⁵ See *Rodriguez v. INS* where the court held that the UNHCR Handbook 'provides significant guidance' Para 13. See also: Satvinder Juss, 'The UNHCR Handbook and the Interface Between "Soft Law" and "Hard Law" in International Refugee Law' in Satvinder Juss and Colin Harvey (eds), *Contemporary Issues in Refugee Law* (Elgar 2013)

¹⁶ Broadly on this see: Alexander Betts, 'Towards a 'Soft Law' Framework For the Protection of Vulnerable Irregular Migrants' (2010) 22 *International Journal of Refugee Law* 209 and Juss, 'The UNHCR Handbook' (n 15)

¹⁷ See: Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press 2007) 36-40.

¹⁸ See for instance: Qualification Directive

¹⁹ Article 7(2)G of the Rome Statute of the International Criminal Court for instance defines persecution as 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'

²⁰ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)

²¹ Article 9(1)

violence (physical, mental, sexual), and acts of a gender and child specific nature.²²

Article 9 provides that:

In order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, an act must:

- (a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
- (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).²³

The Australian definition speaks of serious harm that involves systemic²⁴ and discriminatory conduct, and includes significant physical ill treatment, threats to life or liberty, significant economic hardships, as well as denied access to basic services. Swiss law refers to the term ‘serious disadvantage’ rather than persecution, which it defines as including a threat to life, physical integrity or freedom, as well as measures that exert intolerable psychological pressure. In the United States Aleinikoff’s definition is adopted which relates back to the offensive nature of the imposition of harm.²⁵

Whilst engaging with these specific definitions, this research adopts a human rights informed understanding of persecution as referring to human rights violations²⁶

²² Article 9(2)

²³ Article 9

²⁴ Held to mean no more than not random or non-selective and does not require an applicant to show organised or coordinate violence. See: Anna Dorevitch and Michelle Foster, ‘Obstacles on the Road to Protection: Assessing the Treatment of Sex Trafficking Victims Under Australia’s Migration and Refugee Law’ (2008) 9 Melbourne Journal of International Law Footnote 112

²⁵ Alexander Aleinikoff, ‘The Meaning of Persecution in U.S. Asylum Law’ in Howard Adelman, (ed), *Refugee Policy: Canada and the United States* (York Lanes Press 1991)

²⁶ Zimmermann notes how: “an interpretation of the term persecution in line with accepted methods of treaty interpretation, and as confirmed by both State practice *stricto sensu*, as exemplified by the

demonstrative of a failure of effective State protection.²⁷ This definition recognises the fundamental tenet of refugee law as being the protection of human rights²⁸ by another State when one's own State proves unable or unwilling to provide that protection,²⁹ including when the violation is perpetrated by non-state actors.

Trafficked persons were not on the minds of the drafters of the refugee Convention. However the flexibility the drafters allowed, coupled with progressive interpretations of the Convention (and the specific terms therein) allow for the more egregious types of harm faced by trafficked persons and those associated therewith to be considered as persecutory in nature and thereby worthy of protection, provided other requirements of the definition are also met. Trafficking based asylum claims have benefited from the progressive interpretations of the term, not least through the protection from acts carried out by non-state actors as well as gender and vulnerability sensitive approaches to the issue. The specific mention of acts of sexual, physical and psychological violence in the Qualification Directive can also encapsulate some of the harms faced by trafficked persons. The granting of international protection to trafficked persons can be seen as part of a rights based approach to human trafficking and the notion of persecution is therefore at the forefront of these concerns. However it is argued that many of the harms inherent in trafficking are likely to meet even the more restrictive interpretations of the term persecution.

Qualification Directive, and jurisprudence reveal that, as of today, the violation of *any* human right *may* constitute persecution and thus lead to refugee status". Mahler and Zimmermann (n 4) Para 248

²⁷ Adapted from Hathaway, *The Law of Refugee Status* (n 6); and Mark Symes and Peter Jorro, *Asylum Law and Practice* (Lexis Nexis Butterworths 2003) 84

²⁸ See Satvinder Juss, 'Human Trafficking, Asylum and the Problem of Protection' in Satvinder Juss (ed), *The Ashgate Research Companion to Migration Law, Theory and Policy* (Ashgate 2012) 284

²⁹ See: Hathaway, 'Reconceiving Refugee Law as Human Rights Protection' (n 6)

Part 2: Modes of Persecution

There are a number of clusters of ‘persecution’ that are feared and/or experienced by trafficked persons including: trafficking itself and its exploitative components, re-trafficking by the same or other traffickers, retribution by traffickers or traffickers’ associates and ostracism by the family and/or community. Saito finds that a preliminary assessment of case law from Australia, Canada, the UK and the United States finds that trafficking, re-trafficking and reprisals could amount to persecution.³⁰ They also fulfil the qualitative criteria set out by Aleinikoff³¹ of unacceptable, unjustified and abhorrent infliction of harm.

4.2.1 Trafficking as Persecution

The discussion of the persecutory nature of trafficking itself is important in at least three ways. First, it will be the primary consideration in preventive asylum – i.e. in asylum claims filed by persons at risk of trafficking but who have not been trafficked yet. Second, the discussion is directly applicable to re-trafficking, where the harm faced will be the same. Third, the rights violations inherent in past experiences of trafficking might have lasting effects on the individual and, as seen in the preceding chapter, will inform the determination around whether the applicant’s fear of future persecution is well-founded, or indeed whether there are situations of continuing persecution. It is argued here that human trafficking, as defined in the Trafficking Protocol and other regional anti-trafficking instruments, amounts to persecution for the purposes of the refugee definition. This view is now supported by case law.

³⁰ Kaori Saito, *International Protection for Trafficked Persons and Those Who Fear Being Trafficked*, (UNHCR 2007) 26

³¹ Aleinikoff (n 25)

For instance, the French Asylum Court in Case N°11026228³² held that:

Trafficking in persons, as is defined internationally by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organised Crime of 15 November 2000, constitutes persecution in the sense of Article 1 A 2 of the Geneva Convention.³³

The facts of the case are all too familiar in the field. The case revolved around a claim brought by a Ukrainian national who had been trafficked for the purposes of sexual exploitation. The applicant's dad had taken an informal loan in order to purchase his shop, and after his shop was flooded he entered into financial difficulties and was unable to keep up the payments to the loan sharks. As a result, he was threatened on multiple occasions until people working for the loan shark beat him into a coma. The applicant was also targeted in their family home where money was taken from her, and she was threatened of being responsible for the payment of her father's debt. She filed a complaint with the relevant authorities who promised that the case would be looked into. A few days later, she was invited by a police officer into a service car in which she met the loan shark (and trafficker) referred to as 'uncle Kola'. He pointed out her complaint and she was drugged. She woke up in an unknown place and for days was repeatedly drugged and raped by the same 'uncle Kola' who also forced her to work for him until she paid off her father's debt. Threats against her family were used to ensure she did not run away.

³² The case involved a Ukrainian woman who was kidnapped by (presumed) loan sharks to whom her father owed money. She was forced to work for the trafficker in order to pay off her father's debts. She was repeatedly sexually assaulted and forced into prostitution for about a year in Ukraine. She was then moved via land to France as she was pregnant but managed to escape and with the help of an Armenian (Russian speaking) family and an association claimed asylum in France based on the fear that if returned to the Ukraine the forced prostitution network she escaped would look for and find her, and that the local community, informed of the reason for her disappearance, would reject her

³³ Author's own translation. The original text in French reads: 'Considérant enfin que la traite des êtres humains, telle qu'elle est internationalement définie par le Protocole additionnel à la Convention des Nations Unies contre la criminalité transnationale organisée visant à prévenir, réprimer et punir la traite des personnes, en particulier des femmes et des enfants du 15 novembre 2000, constitue une persécution au sens de l'article 1 A 2 de la Convention de Genève'

She was kept hostage in a house and forced into prostitution. About one year later, she managed to escape whilst being transported in a van to another country on the basis of fake passports that the traffickers had made for them. She discovered she was in France and was taken by a Russian speaking family to an NGO that helped her seek protection. She claimed protection fearing that if she returned home the prostitution network would find her and punish her, and that her local community would reject her if they found out the reasons for her disappearance. She was granted protection as a member of a particular social group made up of persons who had been object of human trafficking with the court specifically noting issues of sex discrimination and corruption as critical features in its determination.

The above quoted statement of the French court is notable. It fits well with the jurisprudence of the European Court of Human Rights which places trafficking in persons squarely within the purview of Article 4 of the European Convention on Human Rights³⁴ and thus bringing it within the scope of Sub-Article 1(A) of Article 9 of the Qualification Directive.³⁵ It builds on and furthers the decision of the same court in March 2012 that found that submitting women to prostitution against their will (read: trafficking for the purposes of sexual exploitation through forced prostitution) constituted persecution.³⁶ Much like this decision, the Australian RRT, focusing on trafficking for the purposes of sexual exploitation has accepted that the severity of abuse endured by trafficked women is tantamount to persecution,

³⁴ In the *Rantsev case* the European Court of Human Rights held: “the Court considers that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and of Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention

³⁵ In order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, an act must: (a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms

³⁶ Redacted case before the Cour Nationale du Droit D’Asile

however it argued that for this to give rise to the grant of refugee status it needed to be linked to the fear of future harm. In RRTA 799, for instance, the court held that:

[The tribunal] accepts that Albanian women who are trafficked and forced into prostitution do suffer harm or mistreatment of sufficient severity such as to constitute persecution.

The value of Case N°11026228 vests partly in its broadened scope covering other forms of exploitation by focusing on the Protocol definition of trafficking. This is notable considering that the case revolved around sexual exploitation, and yet the court adopted a broader overarching statement. It is remarkable, reflective as it is of the broader discourse around human trafficking, as it moves past the traditional distinction between different forms of exploitative purposes in trafficking. After all, as Vandenberg rightly identifies:

Whether a person is trafficked into a sweatshop or trafficked into a brothel, the human rights violations that he or she experiences are fundamentally the same.³⁷

This shift recognises the human rights violations inherent in trafficking. As Weissbrodt and Meili eloquently highlight, one of the most important developments regarding the human rights of trafficked persons is ‘that human trafficking is increasingly viewed around the world as a violation of human rights in and of itself, rather than as a practice or series of events whose consequences may affect the human rights of those it victimises’.³⁸

That human trafficking is a human rights violation is now well accepted both in human rights instruments and in the anti-trafficking instruments. Whilst a legal

³⁷ Martina Vandenberg, ‘Complicity, Corruption, and Human Rights: Trafficking in Human Beings’ 34 Case W Res J Int’l L 323 6

³⁸ David Weissbrodt and Stephen Meili, ‘Recent Developments in the Human Rights of Trafficked Persons’ in Christien van den Anker (ed), *Human Rights and Migration: Trafficking for Forced Labour* (1 edn, Palgrave Macmillan 2012)

mapping has been undertaken in Chapter 1, it is worth recalling the explicit mention of human trafficking in the European Charter of Fundamental Rights and in the Arab Charter of Human Rights, as well as the mention of the trafficking in women in the American Convention on Human Rights. Moreover, the Preamble to the Council of Europe Trafficking Convention acknowledges that 'trafficking in human beings constitutes a violation of human rights and an offence to the dignity and the integrity of the human being'.³⁹ Similarly the preamble to the 2011 EU Anti-Trafficking Directive highlights at the outset that 'trafficking in human beings is a gross violation of fundamental rights and explicitly prohibited by the Charter of Fundamental Rights of the European Union'.

This is the approach taken by the courts (as seen above) and moves forward from the position of the UNHCR that looks into specific human rights violations within the trafficking experience. There is no explicit mention within the UNHCR guidelines that trafficking in and of itself is a human rights violation and/or tantamount to persecution. The guidelines rather err on the side of caution, noting that 'the evolution of international law in criminalising trafficking can help decision-makers determine the persecutory nature of the various acts associated with trafficking'.⁴⁰

This falls short of considering trafficking to be persecution and instead focuses on the specific components of the act. This UNHCR approach carries a considerable advantage in that it does not require the specific crime of trafficking to be made out in order for the persecution element to be met. However it also appears, at least at face value, to grant leeway to differentiate between different forms of exploitation in terms of the persecutory nature thereof. Moreover, considering trafficking as

³⁹ Preamble para 2

⁴⁰ UNHCR Trafficking Guidelines para 15

persecutory in and of itself does not impede the possibility of also considering specific manifestations or elements of trafficking as persecutory when considered individually. This is an issue to which we return below. Seeing human trafficking qua trafficking as persecution reflects a recognition and understanding of the considerable violence inherent in the relationship between the trafficker and the trafficked person.

In its key judgments on the issue the European Court of Human Rights has addressed both trafficking for forced labour (domestic servitude)⁴¹ and for sexual exploitation⁴² and consistently found that trafficking as defined in the Protocol entails a violation of Article 4 – that is the prohibition of slavery, servitude and forced labour. In the case of *Rantsev v. Cyprus and Russia*, the European Court of Human Rights clearly established that trafficking as defined in the Protocol falls squarely within this prohibition.

This case was brought by the father of a Russian girl trafficked to Cyprus on the basis of an artiste visa, forced into prostitution there and later found dead. The case involved significant failures by both the State of origin (Russia) and the State of destination (Cyprus). The court in that case found that human trafficking ‘runs counter to the spirit and purpose of Article 4’⁴³ noting that a number of positive obligations arise on States in this regard. The court expressed itself unwilling to

⁴¹ *Siliadin v. France*, 73316/01, Council of Europe: European Court of Human Rights, 26 July 2005

⁴² *Rantsev v. Cyprus and Russia*, Application no. 25965/04, Council of Europe: European Court of Human Rights, 7 January 2010

⁴³ *Ibid* Para 279

engage normatively with the question whether trafficking is slavery⁴⁴ when concluding that:

In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes “slavery”, “servitude”, or “forced and compulsory labour”. Instead, the Court concludes that trafficking itself within the meaning of Article 3(a) of the Protocol and Article 4(a) of the [European Trafficking] Convention, falls within the scope of Article 4 of the Convention.⁴⁵

These are ‘basic human rights’ as required by the Qualification Directive and as reflected in Hathaway’s rankings of human rights violations for the purposes of identifying persecution.⁴⁶ The author agrees with Juss who argues that:

There is a dimension to human trafficking, namely, its phenomenon as a form of modern slavery that renders its victims particularly apt for the grant of refugee status.

An interesting point in these determinations is that the courts’ reliance on the Protocol definition of trafficking means, at least in theory, that actual exploitation is not required for a finding of a human rights violation tantamount to persecution. As noted in chapter 1, the definition under the Protocol, and the other anti-trafficking instruments, requires an intention to exploit but not the actual act of exploitation. This is an important consideration, and potentially one that was not really

⁴⁴ This raised concerns by academics like Allain that have argued extensively for the legal differentiation between Trafficking and Slavery and for the two not to be equated. In a 2010 Article in the Human Rights Law Review he concludes that ‘with the determination of the Court that obligations emanating from Article 4 of the ECHR come into play because trafficking is based on slavery, the Court reveals itself as not having truly engaged with the legal distinctions that exist between these two concepts. As a result [he continues] the Court has further muddled the waters as to where legal distinction should be made regarding various types of human exploitation, be it the forced labour, servitude or slavery. He notes how ‘the lack of engagement of the Court with Article 4 is manifest in its understanding of the very nature of that provision’. See: Jean Allain, ‘Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery’ (2010) 10 Human Rights Law Review 546. This argument must be seen in the light of Allain’s worthy effort to re-vitalise the legal relevance of the Slavery Convention and the concept of slavery more generally

⁴⁵ *Rantsev* Judgment (n 42) para 282

⁴⁶ Article 9, Qualification Directive 2011

considered by the court. It is however a logical conclusion from the courts determinations.

Others, like Piotrowicz, disagree and argue that trafficking is not a human rights violation *per se* but rather it is a violent crime with a human rights dimension.⁴⁷ His argument is based on the fact that, in the majority of cases, trafficking is carried out by non-state actors of persecution, whilst, he argues, human rights are binding on States. As will be seen later in this chapter, considerable links can be traced between the State and human trafficking (even if carried out by seemingly non-State actors) and indeed, this position has now been superseded by a series of cases in various courts as well as legislative developments that have clearly articulated that trafficking is a human rights violation in and of itself. Some of these elucidations have been outlined above and elsewhere in this thesis. It is argued that the underlying assumption that the same act cannot at the same time be a crime and a human rights violation is flawed. The human rights dimension of the crime of human trafficking is part and parcel of the very nature of the act of trafficking and can therefore not be artificially divorced.

4.2.2 Human Trafficking as Gender Based Persecution

Beyond the general understanding of trafficking qua trafficking as a human rights violation and therefore persecution, there are other ways of seeing human trafficking as persecutory, within the description of persecution as provided by the European Union Qualification Directive. These include trafficking as a gender specific

⁴⁷ See: Ryszard Piotrowicz, 'The Legal Nature of Trafficking in Human Beings' (2009) 4 Intercultural Human Rights Law Review 175. Here he introduces his argument as follows: It is incorrect to say that people trafficking is a breach of human rights for the same reason that it is incorrect to say that 2+2=5: because it is wrong and there is an inherent good in getting things right. He concludes that no human rights are breached when a person is trafficked except for the failure of the State to act

form of persecution. The gendered nature of human trafficking is now well acknowledged, not least through the reference thereto in the Convention on the Elimination of All Forms of Discrimination Against Women and the Declaration on the elimination of all forms of violence against women. Human trafficking affects men and women differently. The UNHCR guidelines are again conservative in this regard noting how: ‘the forcible or deceptive recruitment of women and children for the purposes of forced prostitution or sexual exploitation is a form of gender-related violence, which may constitute persecution’. This builds on the UNHCR Gender Guidelines which provide that:

The forcible or deceptive recruitment of women or minors for the purposes of forced prostitution or sexual exploitation is a form of gender-related violence or abuse that can even lead to death. It can be considered a form of torture and of cruel, inhuman or degrading treatment. It can also impose serious restrictions on a woman’s freedom of movement, caused by abduction, incarceration, and/or confiscation of passport or other identity documents.⁴⁸

The Guidelines continue with their cautious approach to note that:

In individual cases, being trafficked for the purposes of forced prostitution or sexual exploitation could therefore be the basis for a refugee claim where the State has been unable or unwilling to provide protection against such harm or threats of harm.⁴⁹

A critical concern in both these provisions is the focus on trafficking for forced prostitution or sexual exploitation which again is only one part of the broader exploitative complex that makes up the modern understanding of human trafficking. It pigeonholes female trafficked persons into a specific form of possible harm, which ignores the significant violence and harm suffered by females (as well as males) trafficked for other purposes. For instance, stories from persons (most prominently

⁴⁸ Para 18 of the UNHCR Gender Guidelines

⁴⁹ Ibid

women) trafficked into domestic servitude often include horrific accounts of violence, deprivation and harm, tantamount to persecution, which will however not be characterised as sexual exploitation (even if they sometimes also include instances of rape and other forms of sexual abuse).

The case of *C.N v. the United Kingdom*⁵⁰ highlighted some of these issues. The case involved a Ugandan woman, brought to the UK to escape sexual and physical violence and who was then exploited in domestic servitude having to care for an elderly couple, without adequate rest. Her pay went to the facilitator of her migration and she was given very little of it. The money was being taken to pay for a debt she was unaware of. Her documents had been taken away from her. Both her NRM and asylum applications in the United Kingdom were denied and the case was brought before the European Court of Human Rights as a violation of State's obligations under Article 4. It must be noted that the ECHR focused on the specific offence of domestic servitude and did not engage with trafficking per se as an issue. The court addressed the fact that whilst the UK had legislation criminalizing human trafficking, domestic servitude per se had not been criminalised. From the facts available about the case, it appears that the applicant could have been considered as having been trafficked. She was recruited, moved and harboured, through the abuse of a position of vulnerability as well as deception, and exploited in domestic servitude. Viewing human trafficking per se as persecution would help overcome some of these obstacles.

A critical concern which impacts on trafficking based asylum claims is the male dominant perspective of refugee law and the female view of trafficking. Feminists

⁵⁰ *C.N. v. the United Kingdom*, Application no. 4239/08, Council of Europe: European Court of Human Rights, 13 November 2012

have long complained that refugee law neglects gender as a critical consideration noting how women refugees face rejection of their protection claims because their experiences of persecution go unrecognised.⁵¹ Greatbatch argued, as early as 1989, that the problem with refugee law's treatment of female applicants went beyond the non-inclusion of gender as one of the protected grounds but rather on the implementation of every component of the definition. Similar concerns are also raised by Crawley.⁵² Trafficking based asylum claims have tended to be primarily filed by women trafficked for the purposes of sexual exploitation. The growing awareness of the gendered dimension of trafficking, and the serious human rights consequences of trafficking which are themselves gender specific can help refugee law learn how to better address the gender dimensions of persecution.

It must however be acknowledged that significant strides forward have been achieved in this regard. This has been the result not least of the number of asylum claims that have moved the spotlight from persecution in the public sphere to persecution in the private sphere. States, as well as the UNHCR, have now acknowledged the need for gender-sensitive interpretations of the refugee definition (and the need of gender sensitive asylum processes more generally), have adopted guidelines to address some of these issues and are generally increasingly inclined to adopt gender sensitive measures. This has not been a simple or straightforward process and indeed a lot still needs to be done to ensure that effective international protection is available to victims of private harm where the State of origin proves unable or unwilling to offer protection. Trafficked persons

⁵¹ Doreen Indra, 'Gender: A Key Dimension of the Refugee Experience' (1987) 6 *Refuge: Canada's Journal on Refugees*

⁵² Heaven Crawley, *Refugees and gender: Law and process* (n 9); Heaven Crawley, 'Gender, Persecution and the Concept of Politics in the Asylum Determination Process' (2000) 9 *Forced Migration Review* 17

have benefitted from this shift, which has allowed trafficking and harms related thereto to come within the purview of the refugee definition. The sometimes insurmountable obstacles imposed by courts and other status determination authorities however continue to reflect difficulties in this context.

Within the present context there is however the other side of the coin. In the context of trafficking, women continue to be seen as the typical victim despite a growing awareness of males as trafficked persons. As noted elsewhere, anti-trafficking instruments before the Protocol focused exclusively on women and indeed the SAARC Convention deals exclusively with women, whilst the Protocol specifically highlights the situation of women and children. Women are more likely to be recognised as being trafficked than men, who are in turn more likely to be considered undocumented migrants workers. This in turn creates further barriers to trafficking based asylum claims by men, as well as for men to access trafficking related protection more generally. This gender dimension is one to which we return in the next chapter when discussing the Convention ground requirements.

4.2.2.1 Human Rights Violations inherent in the Trafficking Experience

Even if one were to reject the view that trafficking itself is a human rights violation and persecution, its practice entails human rights violations that separately or cumulatively can amount to persecution. These include: violations of the right to life, liberty and security, violations of the right to freedom from slavery, servitude and forced or bonded labour, the prohibition of torture and unusual treatment as well as the right to healthcare, education and work. Anti-trafficking instruments also

acknowledge the human rights violations inherent in trafficking.⁵³ Trafficking can also be linked to other crimes that have also been considered as persecutory in nature. These include abduction, kidnapping, rape, enslavement and restrictions on movement. The UNHCR Trafficking guidelines highlight how:

Inherent in the trafficking experience are such forms of severe exploitation as abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labour, removal of organs, physical beatings, starvation, and the deprivation of medical treatment. Such acts constitute serious violations of human rights which will generally amount to persecution.⁵⁴

4.2.2.2 Re-Trafficking

Re-trafficking is a form of harm raised in almost all trafficking based asylum claims. The term refers to a situation in which a person has been trafficked on one occasion (primary trafficking), had then exited that trafficking situation by any means and has then later re-entered another trafficking situation.⁵⁵ The subsequent⁵⁶ trafficking (including the countries, purposes and traffickers involved) may be the same, similar, related or entirely different from the primary trafficking. The contours of this definition are contentious not least due to the difficulty in determining whether and when an effective 'exit' has taken place. Fears of re-trafficking are linked to the past trafficking, to the conditions in the country of origin, to the lack or inadequacy of

⁵³ See, for instance, the Preamble to the EU Trafficking Directive 2011

⁵⁴ UNHCR Trafficking Guidelines, Para 15

⁵⁵ The IOM report on re-trafficking notes how: 'the term re-trafficking is a problematic one, and wider debate within research on trafficking is needed to reach a common understanding of the term and to assist accurate comparison between data sets, along with facilitating improved case management.' This working definition is an adapted version of the definition used by IOM based on a survey of existing literature and IOM field missions.

⁵⁶ The term subsequent is used instead of second in recognition of the fact that in some cases individuals may be trafficked for a third and fourth time.

protection and support and to the heightened vulnerability of trafficked persons. Re-trafficking remains an area where reliable research is scant.⁵⁷

Beyond re-trafficking it might be worth considering further exploitation as a more useful concept, allowing for human rights considerations to come forth without the stringent application of a multi-pronged definition that might be difficult to prove. Indeed, protection might be merited on the basis of the risk of exploitation rather than trafficking as legally defined.

4.2.2.3 Retribution and Reprisals

Trafficked persons might fear other forms of harm than re-trafficking. In some cases, they are threatened with harm if they escape and this can form the basis of a well-founded fear of persecution. Such harm includes stalking, violence, threats and in some cases murder. Such reprisals could amount to persecution if they involve serious human rights violations or serious harm or intolerable predicament. The assessment of the well-founded fear will also have to consider the particular situation of the individual. Reprisals and threats may be meted out against the trafficked person him/herself or against members of his/her family or other known associates. Either way, such violence or threats thereof will help prove a well-founded fear of persecution if they are of a nature that meets the required threshold. Specific issues affect the likelihood of such reprisals. This includes whether, for instance, the trafficker is believed to have been working alone or through an international gang which might also have members, contacts or links in the relevant country of origin.

⁵⁷ See: Alison Jobe, *The Causes and Consequences of Re-Trafficking: Evidence from the IOM Human Trafficking Database* (International Organization for Migration 2010)

Various people might be subjected to harm or threats, including the trafficked persons themselves, persons at risk of trafficking, family members, friends and associates as well as counter-trafficking activists. This means that such persons can seek protection in their own name, but also that their experiences or threats received might help support the claims of trafficked persons already seeking protection.

4.2.3.4 Ostracism

Many of the cases assessed noted the possibility of ostracism upon return. Ostracism refers broadly to the possibility of being rejected by one's family and community, thereby finding oneself in a situation where social protection is not available and where one's social capital cannot be relied on. The UNHCR Trafficking guidelines note that:

In the individual case, severe ostracism, discrimination or punishment may rise to a level of persecution, in particular if aggravated by the trauma suffered during or as a result of the trafficking process.⁵⁸

Ostracism can involve rejection from the house or community but can take other more severe forms including forced marriage, honour crimes and in some cases honour killings. Rejection by the community increases the likelihood of re-trafficking and of further reprisals partly as a result of isolation from traditional support networks. In case number *V0618399* the Australian Tribunal recognised the possibility of harm at the hands of society at large, including stigmatisation and the denial of social and economic resources further acknowledging that:

In a context where the applicant would be unable to rely on family support...such treatment would amount to serious harm.⁵⁹

⁵⁸ Para 18

This quote also reflects on a wider consideration relevant to the present discussion. As Foster rightly notes: recent jurisprudence has recognised that there is no necessary correlation between the type of harm suffered and the gravity of the impact on the individual.⁶⁰ This means that courts are more willing to take account of the impact on the individual on the basis of the full range of harm feared. This will include for instance difficulties with finding employment and the likely impact of that on vulnerability. In a variety of cases, applicants argued that because of a low skill set it would be very difficult for them to find adequate employment. This is also in line with the second prong of the Qualification Directive description of persecution as resulting from the cumulative effect of various acts.

In other cases ostracism might not impact the trafficked persons themselves but members of their immediate family including their children. In *AM and BM Albania*⁶¹ the court was told how, for instance, whilst the applicant's father was likely to accept them back, he would never accept their child in the house and that the child would have had to be abandoned. This too can amount to serious harm both for the child and for the mother.

The risk of trafficking links to ostracism and destitution can also provide grounds for protection, in some cases even without it being directly sought on behalf of the applicant. The Swedish Courts in *UM-206-11* quashed the Migration Board's decision and granted a permanent residence permit on the grounds of particularly distressing circumstances. It argued that the age (teenage girl), and social (no social network)

⁵⁹ V0618399 as reported in Dorevitch and Foster (n 1) 33

⁶⁰ Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, (Cambridge University Press 2007) 92

⁶¹ *AM and BM (Trafficked women) Albania v. Secretary of State for the Home Department*, CG [2010] UKUT 80 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 18 March 2010

and psychological (psychological problems) circumstances of the applicant, and the fact that she would be confined to an orphanage, would have left her exposed and vulnerable within a context where child labour, child abuse and the sexual exploitation of children were problems and in a State which is a source country for trafficking. The combined circumstances, the court noted, would result in particularly distressing circumstances and therefore warranted protection.⁶²

The modes of persecution whilst distinct are not independent of each other. Ostracism, for instance, is likely to lead to exclusion and destitution which in itself may lead to a heightened risk of trafficking or re-trafficking. Ostracism will also likely mean that social protection will not be available against retribution by traffickers and their associates. State obligations to protect will cut across all of these, however ostracism as an underlying predicament will negatively impact the protection framework that might otherwise be available to an individual applicant.

Part 3: Location of Persecution – Trans-nationality of Persecution

Refugee law protects against harm in one's own State of origin. This is a natural corollary of refugee law as providing surrogate protection.⁶³ As Kneebone succinctly notes: 'the test enshrined in the 1951 Convention concentrates upon a person's fear of persecution in their country of nationality (...)'.⁶⁴ A 'typical' case (if such a thing can be said to exist) involves an individual fearing harm in his/her country of origin and fleeing to the country of asylum (possibly passing through one or more transit

⁶² See: <http://www.asylumlawdatabase.eu/en/case-law/sweden-migration-court-17-march-2011-um-206-11> [last accessed: 5 October 2013]

⁶³ Refugee law is there to provide human rights where the State of origin (which has the primary responsibility to ensure those rights) proves unable or unwilling to guarantee their enjoyment.

⁶⁴ Susan Kneebone, 'Moving Beyond the State: Refugees, Accountability and Protection' in Susan Kneebone (ed), *The Refugees Convention 50 Years On: Globalisation and International Law* (Ashgate Publishing Limited 2003)

countries) in search of protection. There is therefore a clear break between the place where harm is feared and the place where protection is sought.

This dichotomy of 'country of persecution' and 'country of safety' is blurred in the context of trafficking based asylum claims. Whilst the risk of persecution must be judged against the country of origin, the past experiences of trafficking, which might give rise to the well-founded fear, might have taken place in countries other than this State of origin including (but not limited to) the same country where protection is being sought. A number of hypothetical situations illustrate some of the possibilities:

1. An individual from country A is trafficked internally and exploited within country A itself. She manages to escape and seeks asylum in country B.
2. An individual is from country A. He is trafficked internationally and exploited in Country B. He manages to escape and seeks asylum in Country B. Country B is therefore both the place where his exploitation took place AND the country where he seeks asylum.
3. An individual is from country A. She is trafficked internationally and exploited in Country B. She escapes and seeks asylum in Country C. The three countries are therefore completely independent of each other.
4. An individual is a national of country A. She moved freely to country B. In country B she gets recruited by traffickers, taken to Country C and exploited there.

The UNHCR Trafficking Guidelines⁶⁵ note that the fact that the main part of the exploitation has not taken place within the country of origin does not preclude the existence of a well-founded fear of persecution in the individual's own country.⁶⁶ This is in part recognition of trafficking as a process involving a range of acts some of which amount to persecution (even if others might not). In addressing the obligation to investigate allegations of trafficking, the ECHR has highlighted the express inclusion of recruitment within the definition of trafficking adopted in the Protocol and in the Council of Europe Convention.⁶⁷ In particular the court found that there had been a violation by the Russian Authorities of their procedural obligation under Article 4 to investigate alleged trafficking. In determining its competence with regard to Russia the court noted:

The court is competent to examine the extent to which Russia could have taken steps within the limits of its own territorial sovereignty to protect the applicant's daughter from trafficking, to investigate allegations of trafficking and to investigate the circumstances leading to her death.⁶⁸

By analogy, the fact of recruitment in the country of origin creates a sufficient link to that State to merit the analysis of a protection claim. Trafficking must therefore be understood as a persecutory process composed of various parts, often occurring in different locations and over a period of time. One explanation is that the persecutory conduct would not have taken place had the State of origin effectively prevented the preliminary (albeit non-persecutory) stages from successfully taking

⁶⁵ UNHCR, *The application of Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*. (Guidelines on International Protection, 2006) See also: Ryszard Piotrowicz, 'Victims of People Trafficking and Entitlement to International Protection' (2008) 24 Australian Yearbook of International Law 159

⁶⁶ Ibid Para 27

⁶⁷ Para 307. It is interesting to note that the court as here discussing the notion of responsibility to investigate violations of Article 4.

⁶⁸ Para 208

place. The issue of sufficiency of State protection therefore becomes a critical issue here.

In *AZ Thailand*⁶⁹ for instance, the trafficked person was seduced by a 'lover boy'⁷⁰ in Thailand,⁷¹ brought to the UK and exploited there. She then sought and received international protection in the UK. Seduction by a lover boy in itself can hardly be considered as persecutory, however the fact of that seduction being a recruitment technique adopted by traffickers provided a sufficiently strong link to the country of origin for protection to be warranted. This case is symptomatic of many others where the 'main part' of the persecution, indeed the physical, sexual and mental violence, the deprivation of liberty and other egregious acts have in fact taken place in the same country where protection is being sought. This is one way in which trafficking based asylum claims differ significantly from other asylum claims.

The notion of refugee *sur place* is also relevant in a context where an individual left his/her country of origin out of his own free will, found him/herself in a situation of trafficking and now fears going back. A refugee *sur place* is 'a person who was not a refugee when he left his own country, but who becomes a refugee at a later date'.⁷²

The term relates to situations where a change in circumstances makes an individual who is already outside of the country a refugee. For instance, a national of country A might have moved to Country B for work purposes. During her time in country B, possibly as a result of the lack of social capital she was recruited into a trafficking

⁶⁹ *AZ (Trafficked women) Thailand v. Secretary of State for the Home Department*, CG [2010] UKUT 118 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 8 April 2010

⁷⁰ For an overview of this recruitment tactic see: Sidharth Kara, *Sex Trafficking: Inside the Business of Modern Slavery* (Columbia University Press 2009) 9

⁷¹ *AZ Thailand* (n 68) para 4, para 41

⁷² UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3 para 94

ring. Having been exploited in the sex industry she now fears that her family back in country A might disown her for breaking the family's honour (by virtue of having been a sex worker).⁷³ In this case refugee status is still possible even if the persecution was not the primary reason the person left the country of origin, indeed even if it wasn't a reason at all.

For example, in *RRTA 799* 'the adviser noted that there was a "*sur place*" claim based on the eldest daughter having reached puberty while she was in Australia, so she would be in danger now if she were to return to Albania.'⁷⁴ The case involved an Albanian mother and her children. The mother claimed that she was a member of a particular social group composed of her family and that she would be harmed if returned to Albania because of blood feuds in which her family were involved. She highlighted the possibility that her daughters would be abducted and forced into prostitution. The main target of the blood feud was the son.

It is pertinent to note here that in some cases a trafficked person might still fear reprisals within the country in which he/she is seeking asylum. Indeed it is not inconceivable that the risk in such country might be higher than the risk in one's own country. Refugee law does not specifically address this issue except by allowing the trafficked person the right to decide whether to leave the country of his/her own accord. In this context it might be appropriate for resettlement opportunities to be sought.⁷⁵ In the European context it might also have implications for the

⁷³ In some cultures where family honour is highly regarded and honour crimes are relatively frequent, the fact that a daughter was forced into prostitution will not result in her being less severely punished. Of course this is a general statement subject to a number of exceptions; however it can give rise to protection needs in this context

⁷⁴ RRT Case No V01/13868 [2002] RRTA 799 6 September 2002 11

⁷⁵ This latter point is considered in Para 29 of the UNHCR Guidelines

implementation of the Dublin Regulation,⁷⁶ specifically in order to avoid trafficked persons being returned to the country where they have experience exploitation.⁷⁷

This is explored further in Chapter 7.

Part 4: Timing of Persecution

Refugee status protects primarily against future harm.⁷⁸ Past persecution is not a pre-requisite for a finding of refugee status.⁷⁹ This is one of the ways in which asylum differs from protection provisions within the counter-trafficking instruments - its scope extends also to persons who have not yet been trafficked but who have a well-founded fear of being trafficked in the future. However, past persecution can play an important role in proving that the fear of future persecution is well-founded. This section elaborates some of these issues, and their relevance, in trafficking based asylum claims. It discusses the timing of persecution, in particular the notion of trafficking as 'continuing persecution' and the implications of past persecution on the determination of refugee status.

4.4.1 Past Experience as Justifying Protection

The Geneva Refugee Convention provides for the non-cessation of refugee status in situations where a refugee:

⁷⁶ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national; *Official Journal L 050, 25/02/2003 P.0001 - 0010*

⁷⁷ See: <http://www.atlep.org.uk/policy-work-and-publications/publications-list/call-for-exception-from-dublin-ii-procedures-for-victims-of-trafficking/> [last accessed: 5 October 2013]

⁷⁸ See in this regard: *Mileva v. Canada (Minister of Employment and Immigration)*, (1991) 3 F.C. 398 (C.A.) at 404

⁷⁹ *Salibian v. Canada (Minister of Employment and Immigration)*, (1990) 3 F.C. 250 (C.A.), at 258.

is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.⁸⁰

This applies to cessation clauses and *per se* does not apply to the granting of refugee status. The United States' approach has developed this further. It allows the adjudicator to grant asylum on the basis of past persecution even if there is no risk of future persecution. This possibility is however qualified by a threshold of severity. The relevant regulations provide that asylum may be granted even where no future risk of persecution exists where:

The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution.⁸¹

The UNHCR Trafficking Guidelines seek to apply this to trafficking based asylum claims. They note how in particular situations:

Where the persecution suffered during the trafficking experience, even if in the past, was particularly atrocious and the individual is experiencing ongoing traumatic psychological effects which would render return to the country intolerable (...) it may still be appropriate to recognise the individual concerned as a refugee if there are compelling reasons arising out of previous persecution.⁸²

The application of these provisions to trafficked persons might face an extra hurdle especially when part of the past experience of trafficking has happened in the country where asylum is being sought. The UK Courts have been hesitant to extend the realm of this Proviso. In *AZ (Thailand)* the court explicitly addressed the issue and observed that:

⁸⁰ Proviso to Article 1(C) 5

⁸¹ 8 C.F.R. § 208.13(b)(1)(iii)(A). See also: *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989) and *Matter of B-*, 21 I&N Dec. 66 (BIA 1995)

⁸² UNHCR, 'Trafficking Guidelines' (n 64) Para 16

In the case of our appellant, status has not of course been granted and so she cannot argue, and indeed has not done so, that her past persecution alone entitles her to status under the Convention. Her claim is that she has an ongoing fear.⁸³

Whilst recognizing the value of the UNHCR Guidelines it did not apply this specific provision and instead relied on the wording of the Convention which restricts this possibility to the context of cessation of status.

4.4.2 Past-Trafficking as Continuing Persecution

In particular circumstances trafficking, and the results thereof, may amount to continuing persecution. It is argued that this notion is applicable in at least two ways. The first and more direct one refers to where particular elements of the trafficking experience subsist beyond the supposed 'exit' from the situation. This includes, for instance, situations where threats by the trafficker continue and debts 'owed' are chased. In these situations the trafficked person may not be considered to have 'exited' the trafficking cycle, meaning that the trafficking (and hence the persecution) continues. IOM research notes how, in a number of cases, trafficked persons were directly threatened and felt compelled to return to their traffickers as a result. It specifically identifies on-going threats, debts and the involvement of family members in this regard.⁸⁴ The issues of 'debts' to family members and members of the community is also highlighted as particularly problematic by Kelly.⁸⁵

This raises a number of issues pertinent to the present discussion. First, the ongoing nature of the treatment implies that protection ought to be granted irrespective of the future threat. There is on going persecution and therefore protection ought to

⁸³ AZ Thailand (n 68) Para 143

⁸⁴ Jobe (n 57)

⁸⁵ Liz Kelly, "'You Can Find Anything You Want': A Critical Reflection on Research on Trafficking in Persons Within and Into Europe" (2005) 43 International Migration 235

be granted. If the threats happen in the country of origin but not in the country of destination then this re-enforces the claim for protection by providing further evidence of further persecution upon return. This applies both when the threats are made directly to the trafficked person seeking protection and when directed at his/her family members or other known associates. If these threats also happen in the country of destination other concerns may arise regarding the adequacy of the protection afforded in that country and the need for resettlement or other options to be considered.

The second relates to when the consequences of the trafficking survive the 'exit'. These include trauma as well as other medical conditions, including HIV/AIDS and other STIs that might have been contracted during the period of trafficking. In *AZ (Thailand)* the Court highlighted that past experiences of trafficking and the resultant trauma may lead to an ongoing fear of persecution, which is therefore more closely linked to the idea of continuing persecution. The Court noted 'the relevance of the impact of past persecution on the applicant' and acknowledged *inter alia* that:

Someone suffering on-going trauma will be more likely will be more vulnerable to the risk of persecution because of an inability to re-integrate into society.⁸⁶

A distinction must be drawn in this context between the ongoing nature of the harm that started as a result of past persecution and the increased vulnerability to re-trafficking based on the consequences of such previous persecution. There is a very fine line between the two.

⁸⁶ *AZ Thailand* (n 68) Para 144

A fine line distinguishes these two scenarios. In the first there is a continuation of the active role played by the trafficker qua persecutor. In the second it is the impact/consequences of the trafficker's actions that survive the 'exit'. In both cases however the 'exit' cannot be said to have been effective. The former can be described more accurately as continuing trafficking whilst the latter can be seen as continued persecution via the continued impact of previous experiences. In both cases, protection ought to be considered, also in line with the UNHCR Guidelines which clearly provide that:

In cases where the trafficking experience of the asylum applicant is determined to be a one-off past experience, which is not likely to be repeated, it may still be appropriate to recognize the individual concerned as a refugee if there are compelling reasons arising out of previous persecution, provided the other interrelated elements of the refugee definition are fulfilled. This would include situations where the persecution suffered during the trafficking experience, even if past, was particularly atrocious and the individual is experiencing ongoing traumatic psychological effects which would render return to the country of origin intolerable. In other words, the impact on the individual of the previous persecution continues. The nature of the harm previously suffered will also impact on the opinions, feelings and psychological make-up of the asylum applicant and thus influence the assessment of whether any future harm or predicament feared would amount to persecution in the particular case.⁸⁷

4.4.3 Procedural Implications of Past Trafficking

Past trafficking does not only have a substantive impact on proving a well-founded fear of persecution, but it also has procedural relevance primarily linked to the experiences of trauma and the psychological effects thereof. Its implications can result in an applicant who seems to be un-collaborative or distant. This, in turn, means that those making status determination proceedings need to become increasingly aware of the psychology of seeking protection in order to ensure that

⁸⁷ UNHCR, 'Trafficking Guidelines' (n 64) Para 16

they can adequately assess claims without prejudicing persons on the basis of their being traumatised. For example: Herlihy and Turner note how the assumption that inconsistent accounts are probably fabricated is wrong when examined against established empirical knowledge.⁸⁸ They refer to two broad reasons for such inconsistencies, namely barriers to disclosure and failure to recall a traumatic event in the same way on successive occasions. Some of the possible barriers include: the attitude of the determination officer as well as the presence of specific individuals (including relatives) that might inhibit disclosure. Such issues are ever more relevant when disclosing a history of sexual abuse.⁸⁹ This is an issue to which we return in Chapter 7.

Lack of Past Persecution not indicative of Future Risk

In *RRTA 255* the Tribunal made an interesting observation. The case made a number of related claims around past experiences of trafficking for both labour and sexual exploitation. The tribunal found that these claims failed on the basis of lack of credibility. However the court then went on to assess the risk of trafficking in the future finding that:

Taking the country information together with the applicant's past work in the Middle East indicates that the applicant may be vulnerable to trafficking and exploitation. The Tribunal has considered that the applicant has some knowledge of the risks and some past experience. This however, does not remove the vulnerability of future likelihood of being trafficked for exploitation.⁹⁰

⁸⁸ J. Herlihy and S. Turner, 'Should Discrepant Accounts Given by Asylum Seekers be Taken as Proof of Deceit?' (2006) 16 *Torture* 81

⁸⁹ D Bogner and others, 'Impact of Sexual Violence on disclosure during Home Office Interviews' (2007) 191 *The British Journal of Psychiatry* 75

⁹⁰ RRT Case No. 071938045 [2008] RRTA 255 (30 May 2008) 18

Part 5: Actors of Persecution⁹¹

We now turn to discuss the question of agents of persecution, that is, who are the individuals and entities responsible for the persecution that trafficked persons fear should they be returned to their country of origin. Whilst it was traditionally held that persecution could only occur at the hands of the State,⁹² it is now well established in law⁹³ and practice that non-state actors may also be agents of persecution for the purposes of the refugee definition provided that the State is either unable or unwilling to offer effective⁹⁴ protection from such acts.⁹⁵ The EU Qualification Directive provides that:

Actors of persecution or serious harm include:

- (a) the State;
- (b) parties or organisations controlling the State or a substantial part of the territory of the State;
- (c) non-State actors, if it can be demonstrated that the actors mentioned in points (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.

The distinction between State persecution and persecution by non-State actors is significant in terms of the search for international protection. As noted in the

⁹¹ The term Actors of Persecution is preferred to the term agents of persecution. As the Tribunal held in *Gutierrez Gomez* (00/TH/02257; 20 November 2000): ‘Reference to “non-state agents” is not, in our view helpful since it can wrongly imply that such entities have agency in the context of State responsibility. This tribunal prefers to talk of “non-state actors”. The term “actors of persecution” is also the term of choice in the EU Qualification Directive – See Article 6

⁹² This was a reflection of the notion that only the State could be engaged in human rights violations.

⁹³ See Article 6(C) of the Qualification Directive

⁹⁴ The issue of ‘sufficiency of protection’ is often addressed in detail in trafficking based asylum claims

⁹⁵ See UNHCR Guidelines on Non-State Actors of Persecution. See also: Para 19 of UN High Commissioner for Refugees (UNHCR), *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, 31 March 2010; See also: UNHCR Trafficking Guidelines (n 64), UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01; and Para 65 of the UNHCR Handbook (n71)

previous chapter State responsibility is not (or ought not to be) a requirement for international protection. However this does not mean that it is not or cannot be a relevant consideration including in the following ways. First, as Yeo rightly argues, 'it is more difficult for the victim of non-state persecution to find sanctuary under the terms of the Refugee Convention than for the victim of persecution by the State'.⁹⁶ Indeed 'the paradigm case of persecution is that committed by the State.'⁹⁷ In the case of non-State persecution, an asylum seeker will need to prove not only that he has a well-founded fear of persecution but also that the State is unable or unwilling to protect him/her and that he/she will not be safe even if he/she moves to another part of the country. Yeo argues that 'recognition as a refugee is a far from straightforward proposition for the victim of non-state persecution'.⁹⁸ Second, by meeting this upper threshold (stricter test) an applicant will also necessarily meet the lower test under the protection approach. Third, there is justice to be made in ascribing responsibility where it is due. Put differently, protection may be due without State responsibility, but meeting that threshold will make securing international protection easier.

It is argued here, on the basis of the articles on State responsibility of the International Law Commission, that a broader spectrum of cases of human trafficking and related persecution can be attributed to the State making it a situation of State persecution rather than persecution by non-State actors. This is argued on the basis of the varying degrees of involvement of various agents of the State in human trafficking. Human trafficking is primarily conducted outside of the

⁹⁶ Colin Yeo, 'Agents of the State: When is an Official of the State an Agent of the State?' (2003) 14 *International Journal of Refugee Law* 509, 510

⁹⁷ Dorevitch and Foster (n 1) 18

⁹⁸ Yeo (n 94) 510

public sphere by private actors seeking private gain. However State connivance with human trafficking ranges from direct trafficking by the State, to corruption of officials at various levels of power, to lack of investment in effective counter-trafficking efforts, to a failure of capacity and understanding by public officials of human trafficking. In some respects therefore, specific actions can be attributed to the State that may, therefore, provided a significant number of conditions are met, be considered responsible for the trafficking.

International refugee protection will be due, provided all other requirements are met in situations where:

1. Persecution is conducted by the State
2. Persecution is condoned by the State
3. Persecution is tolerated by the State
4. Persecution is neither condoned nor tolerated by the State concerned, but nevertheless present because the State is unable or unwilling to offer adequate protection.⁹⁹

4.5.1 Persecution conducted by the State

The notion of persecution conducted by the State broadly incorporates all acts that can be attributed to the State under international law, specifically under the general principles of State responsibility enshrined in the International Law Commission Articles on State Responsibility (hereinafter the ILC Articles).¹⁰⁰ This issue of

⁹⁹ See: Zimmerman (n 4) 358. See also: Hathaway, *The Law of Refugee Status* (n 4) 129

¹⁰⁰ International Law Commission, 'Report of the International Law Commission on the Work of Its Fifty-Third Session' 53rd Session; See generally: David D Caron, (2002) 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' 96 *American Journal of International Law* 857; David D Caron, 'The Basis of Responsibility: Attribution and Other Transubstantive Rules of State Responsibility' (1998) *Berkeley Law Selected Works*

attribution appears simple enough in theory. However in practice it raises a number of questions as to which conduct can be attributed and which should not. These issues arise in the context of trafficking where States will rarely wish to be seen as responsible for trafficking but where the involvement of State officials is all too often critical in supporting the existence of trafficking networks. As international pressure mounts, few States will openly engage in human trafficking directly, however their agents might be so engaged that responsibility might be attributed. Moreover, other policies of States might also impact on trafficked persons and their need for international protection.

Article 4 of the International Law Commission's Articles on State Responsibility enshrines the general rule that actions of organs of the State are attributable to that State. It provides:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

It goes further to define an organ of the State as including 'any person or entity which has that status in accordance with the internal law of the State'.¹⁰¹ As the commentary on the article clarifies 'the reference to a State organ in Article 4 is intended in the most general sense'.¹⁰² It covers people at different levels within the governmental hierarchy and within different roles. As such it covers acts by legislative and executive bodies that discriminate against women and girls, or which

¹⁰¹ International Law Commission, *Responsibility of States for Internationally Wrongful Acts* (2001) General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4 Article 4

¹⁰² International Law Commission: *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (United Nations 2001) 40

deny access to protection to particular categories of trafficked persons, or that withdraws financial backing to preventive or protection measures. It also covers acts of individual police officers at whatever level as well as the conduct of military personnel.

One example of direct involvement of State organs in trafficking comes from Burma. The 2011 and 2012 Trafficking in Persons Report entry for Burma notes how the military engaged 'in the unlawful conscription of child soldiers and continues to be the main perpetrator of forced labour inside the country'.¹⁰³ The 2013 report highlights how 'military and, to a lesser extent, civilian officials subject men, women, and children to forced labor, and men and boys as young as 11 years old are forced through intimidation, coercion, threats, and violence to serve in the Burma Army as well as the armed wings of ethnic minority groups'.¹⁰⁴ It is clear therefore that such actions can be attributed to the Burmese State because public officials are carrying out the actions in their official capacity and they are recruiting people for the Burmese army. Other situations will include, for instance, countries that in some way fail to protect individuals (often women) from particular types of harm, including where crimes in the name of honour, which may be meted out against trafficked persons, are effectively excused or severely mitigated at law. Very few cases of trafficking will be this straightforward in terms of attributing responsibility to a State.

The difficulty arises from 'the potential for autonomy' within government that is the possibility of specific agents acting outside of what is permitted or official government policy. This is in part addressed through Article 7 of the ILC Articles in

¹⁰³ United States Department of State, *'Trafficking in Persons Report 2012'*(US Government 2012) 104

¹⁰⁴ United States Department of State, *'Trafficking in Persons Report 2013'*(US Government 2013) 111

providing that:

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

This article therefore deals with *ultra vires* acts of State organs or entities including individual officers. It clarifies that if such State organ is 'acting in its official capacity' its conduct is attributable to the State even if he/she/it acted in excess of State authority or even contrary to instructions. As the commentary notes that conduct is attributed even where overtly illegal acts have been committed and where the State has taken measures against that conduct. This builds on the determinations in the *Caire* case before the ILC¹⁰⁵ and the Inter-American Court's decision in *Velásquez Rodríguez*.¹⁰⁶ In both of these cases it was determined that the relevant States were responsible for the acts of their agents even if they were in violation of their duties or orders.

This covers situations where police officers themselves might harass trafficked persons, including through threats of revealing to the community information about the individual's past engagement in the sex industry. Threats of sharing this information with the community are used to extort financial, sexual and other favours from trafficked persons and may constitute secondary victimisation. It also addresses situations where public officials directly or indirectly assist or support the

¹⁰⁵ This case dealt with the murder of a French national by two Mexican officers who having failed to extort money from him took Caire to the local barracks and shot him. In that case, the commission held that the two officers, even if they are deemed to have acted outside their competence and even if their superiors countermanded an order, have involved the responsibility of the State, since they acted under cover of their status as officers and used means placed at their disposal on account of that status

¹⁰⁶ The Inter-American Court of Human Rights in the *Velásquez Rodríguez* case said that, under international law, a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law

trafficking of persons, often in return for monetary compensation from the traffickers or their associates (read: corruption). For instance, a border official who turns a blind eye to suspicious behaviour, or to clearly faulty documentation in return for a payment from traffickers. Both direct victimisation and corruption are illegal in most countries however this does not mean that the State's responsibility cannot be engaged.

In the UK case of *AZ (Thailand)* part of the determination revolved around whether or not the former trafficker had links with the Thai immigration authorities. The Court referred to widespread reports of police and immigration officials' collusion with traffickers and criminals¹⁰⁷ and concluded that in that case there was sufficient evidence to indicate links between the trafficker and government officials. This in turn was considered to be evidence that the fear of persecution was well-founded. In specific cases the involvement and support of public officials might be such to attribute responsibility for tolerating or encouraging trafficking to the State itself, bringing the case forward as a State persecution case.

The key question is therefore that of distinguishing between 'official conduct' and 'private conduct', and determining whether particular conduct can be considered as 'official' and therefore attributing responsibility to the State. This determination rests on the question of whether 'they were acting with apparent authority'. The practical test appears to be: has his official position assisted or facilitated the possibility of the individual in carrying out the particular conduct? So that for instance, a police officer that uses his access to police intelligence in order to avoid detection can be said to carry the responsibility of the State. This again builds on the

¹⁰⁷ *AZ Thailand* (n 68) para 122

determination in the Caire incident where the ILC held that responsibility was attributed since the officers ‘acted under the cover of their status as officers and used means placed at their disposal on account of that Status’.¹⁰⁸ We can therefore see State involvement in trafficking across a spectrum (illustrated below) ranging from State legislation on one side, to acts and on to completely private conduct on the other.

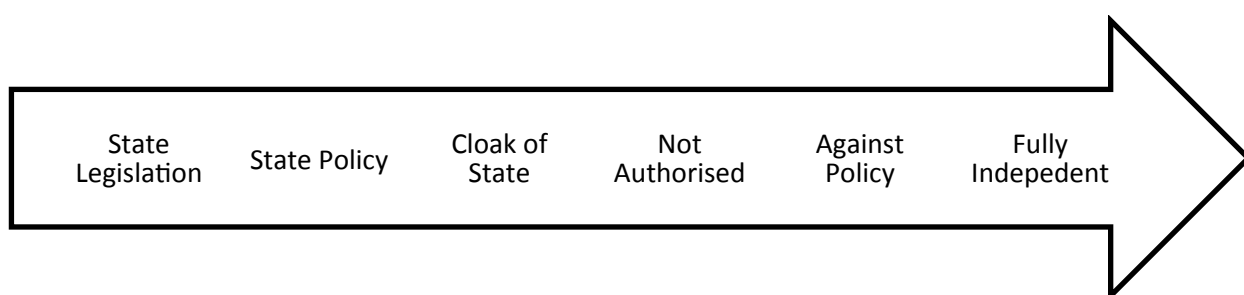


Figure 9: Spectrum of State Involvement in Human Trafficking

The key question to be asked in assessing for the attribution is whether the official position of the individual enabled the conduct. If the answer to this is in the affirmative, than State responsibility is engaged. It is also engaged if the issue (in the present context: involvement of officials with trafficking) was systemic or recurrent and the State knew, or ought to have known, and should have taken steps to prevent it and failed to do so. The term recurrent in this context does not necessarily entail widespread corruption and trafficking across a police force but covers also situations where the same individual or small group of individuals constantly engage in the conduct.

One way in which apparent authority would feature in the present context is where one’s official capacity provides the knowledge and protection to operate with

¹⁰⁸ At 531. Cited in ILC Commentary, Article 7 Para 5

impunity. For instance where a police officer who is also involved in a brothel uses his access to police information to avert detection of his trafficking operations. Put differently, the conduct (trafficking) is made possible because of the use of the official position. In the above described case before the French asylum courts for instance, a police vehicle was used by a police officer to abduct the applicant for the trafficker.

4.5.2 State Accountability for Private Conduct

There is also indirect responsibility arising out of the horizontal applications of legal obligations. That is a State may be responsible for the effects of the conduct of private parties if it failed to take necessary measures to prevent those effects. Failure to prevent an anticipated abuse or violation by a private individual or entity will invoke the responsibility of the State, as highlighted by the European Court of Human Rights in, *inter alia*, *Rantsev v. Russia and Cyprus*. In this case the persecutory role of the State is engaged not in the direct persecution of the applicant but rather through the failure of protection. This is in line with the definition of persecution provided above, which describes persecution in terms of human rights violations demonstrative of a failure of State protection.

There is also a middle way. If State responsibility cannot be established and therefore the State is not considered an agent of persecution, but State officials are in some way involved, 'the sufficiency of protection test' elaborated in the previous chapter, must be applied less rigidly accounting for the heightened risk resulting from the involvement of State officials. Even if the extent or nature of official involvement in trafficking is not such as to attribute responsibility to the State, it will

still negatively impact the ability of the State to offer protection and the general assessment of the well-founded fear test.

4.5.3 Persecution by Non-State Actors

However in the majority of cases, trafficking based asylum claims are based on persecution feared from or having been perpetrated by non-state actors for whom the primary (if not sole) purpose is monetary profit. These include: traffickers, traffickers' associates, new traffickers, as well as criminal gangs. Some of these cases reflect how participation in the criminal justice process increases the risk to trafficked persons.¹⁰⁹ In other cases, the 'loss of earnings' and the 'non-payment of accrued debt' were also referenced in the judgment.¹¹⁰ The latter point again reflects the impact of past persecution on the future risk. Here the question will arise as to whether the State can offer effective protection from harm at the hands of non-State actors. What is clear is that, if there is a well-founded fear of trafficking related persecution at the hands of non-State agents, and the State is unwilling or unable to offer adequate protection, refugee status should be granted.

In other cases, trafficked persons might fear their family members. This is often linked to the perception of shame brought unto the family by a member thereof having worked in the sex industry. Family members may harm the trafficked person through 'honour crimes' or may reject the trafficked person leaving them increasingly vulnerable. In certain communities, rejection by one's family might be

¹⁰⁹ See for instance: *SB (PSG - Protection Regulations - Reg 6) Moldova v. Secretary of State for the Home Department*, CG [2008] UKAIT 00002, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 26 November 2008

¹¹⁰ See for instance: *AZ Thailand (n 68)*

sufficient to make one's existence in the original community untenable.¹¹¹ Closely related to this is fear of ostracism and rejection by the community.

In conclusion, a number of State and non-State actors of persecution interact in the context of trafficking. It is to be noted that the above discussion has created distinctions between different agents of persecution, however in reality the lines are blurred and on many occasions more than one agent of persecution will be involved in a trafficking based asylum claim. For instance, rejection by the family renders a trafficked person more susceptible to recruitment by traffickers. Traffickers might use family members to exert pressure on trafficked persons. Corruption by public officials allows traffickers to flourish and results in counter-trafficking efforts being ineffective. The asylum process must therefore be increasingly aware of the complexity of relationships between various factors in order to assess whether one's fear of persecution is well-founded.

Part 6: Concluding Remarks

This chapter has addressed the issue of persecution as it applies to trafficking based asylum claims. It has argued that such claims differ from 'typical' asylum claims in some ways. The flexibility allowed by the Convention to provide progressive interpretations of the term has allowed the possibility for trafficked persons to seek refugee protection, however this is not without its challenges. Juss argues that the threshold of persecution is too high and difficult to meet and that the humanitarian underpinnings of refugee law should move away from this requirement.¹¹² In the

¹¹¹ See also: Ryszard Piotrowicz, 'Victims of People Trafficking and Entitlement to International Protection' (2008) 24 *Australian Yearbook of International Law* 159

¹¹² Satvinder Juss, *International Migration and Global Justice* (Ashgate Publishing Ltd. 2006)

context of trafficking, it is argued, many of the forms of harms feared by trafficked persons can amount to persecution or serious harm and thereby merit protection. The threshold may in some cases be too high, and an over-emphasis on a tick box approach of definitional criteria may result in persons who have been persecuted or who fear being persecuted falling through the cracks in the system. In this context, trafficking legislation and international human rights instruments that address, directly or indirectly, the issue of trafficking should provide the relevant criteria for the assessment of a well-founded fear of persecution and specifically of the persecutory nature of issues around human trafficking. It is also critical, this chapter argues, that past experience of trafficking be borne in mind, not only for a substantial determination perspective but also from a procedural angle.

This section has identified some of the ways in which trafficking based asylum claims challenge some of the traditional workings of refugee law. First it relates to a variety of harms across a time and severity spectrum, requiring informed status determination processes. Second, for the most part, a significant part of the past persecutory treatment took place in the same country where protection is being sought. Third, much like cases involving domestic violence, the States of protection are not exempt from the possibility of trafficking within their borders. Indeed, despite having put in place considerable measures to prevent and combat trafficking, many of the protection countries assessed remain countries where trafficking is prevalent. In part this discussion espouses the humanitarian underpinnings of the international refugee law system. A State of origin might indeed object to this form of protection on the argument that the country providing protection was also to blame for the persecution. However that is a choice for the

applicant to make and should not preclude the granting of protection. Indeed, as discussed elsewhere, the grant of refugee status might be a way of remedying the inadequate protection offered by States of destination. However as Stairs and Pope rightly highlight:

Compliance with the Convention means neither that the state of refuge has a perfect human rights record nor that the right violated in the country of origin will be absolutely protected in the country of refuge.¹¹³

The discussion in this chapter also supports the argument raised elsewhere in this thesis that even if a more restrictive interpretation of the refugee definition had to be undertaken, trafficked persons may still fall within the definition. It has been argued that the notion of State persecution in trafficking can encompass a broader spectrum of acts that have often been considered within the non-State actor bracket. Moreover, it has been argued that trafficking qua trafficking is a human rights violation tantamount to persecution as determined by courts across various jurisdictions. The notion of continuing persecution was also explored, highlighting its relevance in the context of trafficking based claims and identifying how in a number of cases, some of the lasting impacts of trafficking will be of such nature as to amount to a continuation of the persecution itself.

As noted, the findings of this chapter cannot be divorced from the discussion in the previous chapter which has in the most part dealt with issues around vulnerability to the persecutory treatment discussed here. The next chapter will discuss the requirement that this treatment be linked to one of the Convention grounds listed in the Geneva Convention. Indeed despite having a well-founded fear of persecution, refugee status will not be recognised unless the applicant can show that the

¹¹³ Jacqueline R Castel, 'Rape, sexual assault and the meaning of persecution' (1992) 4 International Journal of Refugee Law 39

persecution is for a Convention ground. We therefore now turn to this discussion in the next chapter.

Chapter 5: Convention Ground Nexus

Having assessed whether and when trafficking based claims meet the threshold of 'well-founded fear of being persecuted' this chapter now turns to an assessment of the notion of Convention ground nexus as it applies to trafficking based asylum claims. The specific focus on this second limb of the refugee definition is justified by the number of cases where this was the issue under consideration and where the well-founded fear of persecution was either met or assumed.¹ In various (too many) cases refugee protection was denied not because an individual did not have a well-founded fear of persecution but because, despite this well-founded fear, in the tribunal's assessment the Convention ground nexus had not been established.

In most cases, this was because the Membership of a Particular Social Group (hereinafter MPSG) had not been established, or because the court was not satisfied that such membership, or indeed another Convention ground, was the reason behind the trafficking and/or other persecutory actions. This is an issue where a legalistic approach to the wording of the law can run counter to the humanitarian imperatives that (should) underpin international refugee protection. These cases clearly illustrate that despite its broad humanitarian imperative, the Convention is not intended to protect everyone who has a well-founded fear of persecution but is limited to those instances where the individual is particularly targeted because of who he is or what he believes.²

¹ As many of the cases assessed in the course of this research were appeal decisions, in many of them the well-founded fear of persecution had been established before, in the lower tribunals, and was not always re-assessed by the appeal chambers/courts

² See: James C Hathaway and Michelle Foster, 'Membership of a Particular Social Group' (2003) 15 International Journal of Refugee Law 477

The core claim here is that the ground of MPSG, with its undefined contours, has provided a route into refugee protection for trafficked persons. Its inconsistent application, however, risks prejudicing consistency of status determination. The Norwegian model, as described, manages to overcome some of these shortcomings and carries with it a number of important ramifications and implications. It is not, however, without challenges and problems, including the possibility of restricting protection. Moreover, other grounds listed in the same definition should no longer be side-lined as they may also provide viable Convention ground links to the persecution feared. In particular this chapter will make the case for the broader use of race as a ground in arguing trafficking based asylum claims.

This chapter is organised as follows. Part 1 provides a brief overview of the requirement of a Convention ground nexus, and the nature of the required nexus. In particular it addresses the challenge of proving a Convention ground nexus within a context where criminal profits are clearly the primary motive for the harm feared. Part 2 focuses on membership of a particular social group, in discussing first how it has been applied thus far across a number of jurisdictions and then introducing the Norwegian model and discussing the motivation behind this legislative innovation and its implications in principle and practice. It further discusses the 'promising practice' value of this provision and the likelihood of its spreading to other jurisdictions. Part 3 then turns to the grounds of race and religion, using the examples of Roma ethnicity to argue that ground beyond membership of a particular social group may also offer that vital link into refugee protection. Part 4 concludes the discussion.

Part 1: Convention Ground Nexus – An Overview

As noted elsewhere, Article 1A(2) of the refugee definition defines a refugee as someone who:

Owing to well-founded fear of being persecuted *for reasons of race, religion, nationality, membership of a particular social group or political opinion*, is outside of the country of his nationality and is unable, or owing to such fear is unwilling, to avail himself of the protection of that country (...) (emphasis added)

The definitional requirement of Convention ground nexus asks a number of intermittent questions, namely: does the group or category exist? Is the applicant a member of the group/category? And, if so, is the persecution feared for reasons of that membership? Each of these questions must be answered in the affirmative for a positive determination to be made. Whilst broad interpretations have been proposed with regard to all five categories listed in the Convention, the first of these ‘tests’ can be problematic considering varying standards adopted by different courts and tribunals. This is particularly so with regard to the Convention ground of MPSG.

Level of Causation

A core question revolves around the standard (or intensity) of causation, and specifically what sort of relationship must be proven between the persecution feared (and in the present analysis the trafficking related harm) and the particular Convention ground. Put differently, will, for example, heightened vulnerability linked to one’s ethnic origin be sufficient to prove that the persecution is ‘for reasons of’ race. It is argued here that if one’s ethnic background and/or religion and/or MPSG heightens his/her vulnerability to trafficking in a significant way which places him/her at greater risk, then that should be sufficient to meet the nexus

requirement. Causation in this regard can be seen across a spectrum with different courts relying on different standards, from the 'sole cause approach', which has now been largely considered inappropriate for the purposes of the Convention, to the 'one factor' approach. Foster makes some important observations in this regard. She concludes that 'absolutely no basis exists' for a sole cause approach in either the text or the objects and purpose of the Convention. Neither scholars nor courts have supported such a test. She also deems the 'but for' test unworkable, despite its advantages, noting that 'it would require significant modification in the refugee context, particularly in relation to multiple cause cases'.³ Foster however also makes a convincing argument based on the relevance of anti-discrimination principles underlying both human rights and refugee law. The various possible configurations come across a spectrum which is illustrated in Figure 10 below.

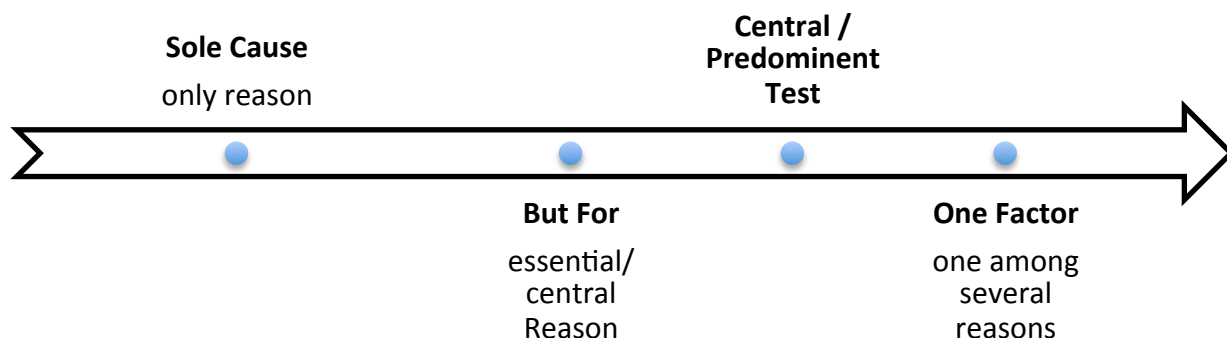


Figure 10: Spectrum of Causation

Closely linked to this issue is the question of whether the intention of the persecutor is also a relevant consideration in this assessment. This is a relevant query in the context of trafficking based asylum claims where the primary motive is often not the Convention ground but rather the criminal profits. As Zimmermann notes:

³ Michelle Foster, 'Causation in Context: Interpreting the Nexus Clause in the Refugee Convention' (2001) 23 Michigan Journal of International Law 265, 335

The determination of the causal connection between acts of persecution on the one hand, and one or more of the Convention grounds on the other, therefore, needs to be made on the basis of an objective assessment of the underlying reasons for persecution, rather than being based on the subjective motivation of the respective persecutor.⁴

This issue was raised in the case of *Rreshpja v. Gonzales* before the United States Court of Appeal. The case, to which some reference has been made previously in this research, revolved around a young Albanian woman on whom an attempted kidnapping for the purposes of sex trafficking had occurred. She claimed asylum on the basis of her risk of trafficking in the future. The immigration judge rejected this argument on, *inter alia*, the ground that even assuming that such a social group exists, 'Rreshpja failed to demonstrate that her attempted kidnapping in June of 2001, or her fear of being forced into prostitution if she is returned to Albania, was the result of membership in that social group as opposed to the unfortunate consequences of widespread crime in Albania.'⁵ Having determined that the MPSG requirement had not been met, the court evaded the discussion on the intention component and therefore the immigration judge's argument holds.

Similarly in *RRTA 727* the court found that:

Albanian women (and girls) are not trafficked and mistreated because they are women (or any subset thereof). The essential and significant reason they are trafficked is for commercial gain. This is most simply demonstrated by observing that boys are also trafficked from Albania for sexual exploitation. Men, and children of both sexes, are trafficked for labour. Moreover, it is not only women trafficking victims that experience violence, although the degree of violence may differ.⁶

The court in this case did not delve into the relevance of this intention, but rather

⁴ Andreas Zimmermann and Claudia Mahler, 'Article 1 A, para. 2 - Definition of the Term Refugee' in Andreas Zimmermann, Jonas Dörschner and Felix Machts (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) 374

⁵ *Rreshpja v. Gonzales*, 420 F.3d 551 (6th Circuit 2005)

⁶ *RRT Case No. 0903290*, [2009] RRTA 727, Australia: Refugee Review Tribunal, 4 August 2009 para 48

moved swiftly on to discuss how the Convention ground nexus requirement could be met by looking at the failure of State protection. The courts have all too often made a leap from causation to intention, a leap which is, as Foster notes, 'seldom identified or justified'.⁷

The difficulties are eased slightly in situations of non-state agents of persecution which is often relevant in the context of trafficking based asylum claims. In these cases the Convention ground nexus can be established either with regard to the targeting for persecution OR with regard to the failure of the State to offer protection. Therefore, even if, for instance, it cannot be shown that traffickers specifically target persons of Roma origin, the Convention ground requirement can still be met if the failure of State protection can be attributed to the Convention ground.

As per the UNHCR Handbook, it is not the responsibility of the asylum applicant to determine the Convention ground even if in practice the burden of proof remains on the claimant.⁸ In many of the cases assessed in the course of this research, the applicant's representative highlighted a number of possible groups, and whilst the court often identified its own group it also engaged with the suggestions made by the representatives. The case shadowing component of this research identified how representatives of the Secretary of State often asked applicants 'why do you think you were targeted' passing the buck onto the applicant to identify the reason for his persecution.

⁷ Foster (n 3) 269

⁸ UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3

The list of grounds in the Convention is not exclusive, and the grounds will, in practice, often overlap. This is an important consideration in the present context where broader social groups, such as gender, are identified and the risk of trafficking related persecution is then also linked to one's racial background. For instance, Roma women are more likely to be targeted for trafficking and less likely to receive State protection than women generally in the community. This is reflected in the greater disproportionate representation of Roma women within the 'trafficked women' category.

Part 2: Membership of a Particular Social Group

Of the Convention grounds listed in the definition above, 'membership of a particular social group' is by far the most enigmatic. Attractive as it might be with its promise of breadth, it allows wide discretion to courts and tribunals providing them with 'one of their greatest challenges in refugee law'.⁹ It has led to inconsistency both within and between jurisdictions. Having been introduced at the last minute on the suggestion of the Swiss delegation, there is little guidance in the drafting history of the Convention as to its purported meaning. This notwithstanding, Zimmermann concludes that 'today there seems to be an emerging consensus on the necessity to elaborate a definition as sharp as possible, providing (...) (MPSG) with a well-shaped independent meaning.'¹⁰

Such necessity partly reflects how the ground has become an increasingly popular choice for asylum advocates. The social group category is understood to constitute a

⁹ Mark Symes and Peter Jorro, *Asylum Law and Practice* (Lexis Nexis Butterworths First Edition 2003) 160

¹⁰ Zimmermann and Mahler (n 4) 391

dynamic category open to future developments.¹¹ It has been used as the vehicle by which some particularly controversial cases have been litigated as 'pressing contemporary issues are necessarily drawn to it'.¹² The ground has been increasingly invoked to advance the evolutionary nature of the refugee definition and has been critical in ensuring the on-going relevance of the Convention and that it remains a lively document able to address some of the challenges of modern forced migration(s).

Trafficked persons and persons at risk of being trafficked are one such group that have benefitted from the elusive definition of the ground, albeit in an unclear and often clumsily approached manner. The vast majority of trafficking based asylum claims assessed in preparation for this chapter have been argued on this ground, and reasonably so considering the potential of the provision to incorporate such cases.

5.2.1 General Principles

It is pertinent at this stage to briefly outline some of the general principles on defining MPSG. There are broadly speaking two (with indications of a 3rd) approaches to determining the existence of a particular social group, namely, the protected characteristic approach and the social perception approach with the third referring to social visibility. An on-going question is whether these tests should be applied alternatively or cumulatively. The size of the group is (or ought to be) irrelevant and cohesiveness is not required. Members of the group need not know

¹¹ Ibid

¹² Satvinder Juss, 'Human Trafficking, Asylum and the Problem of Protection' in Satvinder Juss (ed), *The Ashgate Research Companion to Migration Law, Theory and Policy* (Ashgate 2012)

each other, and not all members need be persecuted. The group cannot be defined solely by reference to the persecution that they fear, meaning that the group must exist independently of the fear of persecution. The determination of the existence of a particular social group cannot be done in the abstract and will be dependant on the factual circumstances and the country conditions. This is particularly so with regard to the social perception test. In *RRTA 727* the Australian Tribunal noted how

The High Court has emphasised the relevance of cultural, social, religious and legal factors or norms in a particular society in determining whether a posited group is a particular social group in the society.¹³

In *AM and BM* the UK Court noted how ‘victims of trafficking for sexual exploitation’ may constitute a particular social group in one country but not in another. Finally, there must be an effective link between the act feared and the ground of persecution claims. As the RRTA held in *RRTA 255*:

It is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared for reasons of the person’s membership of the particular social group.¹⁴

5.2.2 Definitions and Approaches

The European Union Qualification Directive provides the most detail in any of the international and regional refugee law instruments in terms of defining PSG. It provides that:

A group shall be considered to form a particular social group where in particular:

¹³ *RRT Case No. 0903290*, [2009] RRTA 727, Australia: Refugee Review Tribunal, 4 August 2009, para 44

¹⁴ *RRT Case No. 071938045*, [2008] RRTA 255, Australia: Refugee Review Tribunal, 30 May 2008, 12

- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, **and**
- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society [emphasis added]¹⁵

The wording of this provision has given rise to controversy on whether it promotes a cumulative assessment. The tribunal in *SB Moldova*, deciding on the basis of the UK transposition of the Directive, held that the term ‘and’ in the provision should be given its natural meaning.¹⁶ The European Council on Refugee and Exiles noted how this wording is ‘open to restrictive interpretation requiring that applicants both share an innate characteristic that cannot be changed AND are perceived as a distinct group by the surrounding society (Article 10 (1) (d)).’¹⁷

Whilst the UNHCR handbook originally only provided limited guidance, the same organisation has since issued guidance on the meaning of particular social group. It promotes a ‘combined alternative approach’ through the following definition:

A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, **OR** who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.¹⁸

¹⁵ Article 10(1)(d)

¹⁶ *SB (PSG - Protection Regulations - Reg 6) Moldova v. Secretary of State for the Home Department*, CG [2008] UKAIT 00002, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 26 November 2007 Para 3

¹⁷ ECRE, Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Qualification Directive (European Council on Refugees and Exiles 2010) 6

¹⁸ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02, para 11

The UNHCR intended the tests to be taken as alternatives, highlighting elsewhere that the second (public perception) test should be applied in the case that the immutable characteristic test fails to be met in a particular case. As such the second test can be seen as a second safety net to be applied if the first test is unable to be met.

Defining MPSG has also been subject to increasing judicial debate with some of the more prominent cases including: *Matter of Acosta* in the United States, *Ward* in Canada and, *Shah and Islam* in the United Kingdom. All three adopted the immutable characteristic approach. Another critical question is the need for discrimination as a key component to determining the existence of a particular social group. Lord Hoffmann in *Shah and Islam* noted how:

in choosing to use the general term ‘particular social group’, rather than an enumeration of specific social groups, the framers of the Convention were... intending to include whatever groups might be regarded as coming within the anti-discriminatory objective of the Convention.¹⁹

Yet the determinative role of discrimination is disputable, especially in the context of persecution by non-state actors. The case law assessed in the course of preparing this chapter highlights a wide margin of inconsistency between how courts assess these claims. Research respondents have also widely criticised the approach, especially within the UK context, arguing that the dual approach is wrong and adds an extra requirement to accessing protection. The landmark and precedent setting judgment in *SB Moldova*, hailed as positive by some, may be considered a dangerous decision based on its restrictive interpretation of the requirements for the existence of a MPSG. The case revolved around a claim brought by a young Moldovan woman who had been trafficked to the UK for the purposes of sexual exploitation. She subsequently gave evidence against the person responsible for her sexual

¹⁹ *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, United Kingdom: House of Lords (Judicial Committee), 25 March 1999, 15

exploitation in the United Kingdom which resulted in the successful prosecution of the trafficker. The latter received a term of imprisonment in excess of five years, for offences of controlling prostitution and false imprisonment. At the time when the case was being heard the trafficked was at large. The Appellant feared harm at the hands of the trafficker, his family and his associates if she is returned to Moldova.

This chapter is proposing a critique of the decision of the Tribunal in *SB Moldova* on two counts. First, it takes a restrictive interpretation of what is, admittedly, a vague legal provision in both EU and national law. The tribunal concluded that the word “and” in the Protection Regulations should be given its natural meaning, thereby requiring the cumulative test.

Second, it goes against the principle of precedent as set by the Court in *Fornah* and *Shah and Islam*. A key issue that arises from *SB Moldova* is a procedural one. As Counsel in the case explained, that whilst the test applied by the tribunal was indeed a wrong one, the case could not be appealed because the appellant was successful in her claim. *SB Moldova* is, however, a published decision and therefore has an impact in how future cases are decided. This is an area where procedure and substance collide, and this could cynically be seen as a strategic move by the Court to ensure a legal basis for the application of the directive. This decision in *SB Moldova* was also reiterated in *AZ (Thailand)* as well as in subsequent cases.

The author supports the combined alternative approach proposed by UNHCR as being more akin to the humanitarian principles that underlie the Convention. However, it is also argued here that, had the dual test been applied, the majority of trafficked persons can still be considered as refugees.

This chapter now moves on to discuss the application of the tests developed through the case law to:

1. Trafficked persons
2. Persons at risk of being trafficked
3. Persons who face harm as a result of their association with trafficked persons.

Whilst the majority of cases assessed in the course of this research have dealt with individuals who have been trafficked (former victims of trafficking), others might also face persecution and one of the strengths of asylum over the protection provisions in counter-trafficking instruments is precisely its expanded scope to cover other categories.

The tests include the protected characteristics approach (which relies on the immutable characteristic requirement), the social perception test (which relies on whether a group is perceived as such by the society in which it exists and, the visibility test which relies on the visibility of a particular group, and individuals within the group, in the particular society.

5.2.2.1 Protected Characteristics Approach

In *Matter of Acosta*²⁰ and *Ward*,²¹ the US and Canadian Courts respectively described the protected characteristic approach as being construed via the *ejusdem generis* maxim in part as an extension to the other discrimination grounds listed in the definition. Immutability can occur in one of three broad ways. The first is a

²⁰ *Matter of Acosta*, A-24159781, United States Board of Immigration Appeals, 1 March 1985

²¹ *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993

characteristic that cannot be changed. The second is a characteristic that is so fundamental to the human conscience and dignity that someone should not be expected to change. And the last characteristic are matters that are immutable because of historical permanence. Former victims of human trafficking clearly fulfill this criterion. In *AZ Thailand* the court found (stating what can be deemed obvious) that: 'the shared past experience of being trafficked for sexual exploitation amounts to a common, immutable characteristic.'²²

The same cannot, however, be said for persons at risk of being trafficked and for persons whose risk is by reason of association with trafficked persons (ex. family members). In this regard, therefore, broader 'groups' might be appropriate considerations as was in fact considered in various cases where issues of gender and broader vulnerability were considered. In the case of family members, that specific group (the family) may provide the necessary link to the definition.

5.2.2.2 The Social Perception Approach

The social perception test briefly requires that a particular group is perceived as such within the specific social and cultural context of the society in question. In applicant A, the Australian court noted how the term 'particular social group' connotes persons who are defined as a distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them. In Applicant S, the Court explained that the 'general principle is not that the group must be recognised or perceived within the society, but rather that the group must

²² *AZ (Trafficked women) Thailand v. Secretary of State for the Home Department*, CG [2010] UKUT 118 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 8 April 2010

be distinguished from the rest of the society.²³ The defining criteria are therefore an objective standard that sets the group apart, rather the recognition by the community. Indirectly this brings the test closer to the immutable characteristic approach by requiring the existence of specific characteristics that can be identified (by society or by the persecutor).

Fitting trafficked persons within the scope of the social perception raises more challenges and one would have to look beyond the mere trafficking experience. Marouf argues that the social perception test would inevitably prejudice trafficked persons seeking asylum, linking this to the invisibility of trafficked persons in society. She argues how trafficking for a variety of purposes is linked to invisibility, as trafficked persons are locked away in homes, hotels or brothels, and how non-sex related trafficking increases the levels of invisibility in particular through the fact that their labour per se is not necessarily illegal or otherwise socially frowned upon. As the Norwegian legislative proposal highlighted:

From the social perception test, the question becomes more questionable because the former victims of trafficking do not necessarily want to be regarded by society as a social group.

There are a number of ways in which trafficked persons can fall within the scope of the social perception test. First, if it is enough that the group be ‘perceived’ as such by the persecutors, then the heightened vulnerability resulting from having been trafficked might meet the relevant criterion. Second, it emerges from this research that, in many societies, trafficked persons find themselves ostracised whether as a result of their image as ‘failed migrants’ or as ‘former sex workers’. Some of the factors linked to having been trafficked, including the heightened vulnerability to re-

²³ *Applicant S v. Minister for Immigration and Multicultural Affairs*, [2004] HCA 25, Australia: High Court, 27 May 2004 para 27

trafficking and trauma associated with past experiences, may increase the group's visibility at least in the eyes of traffickers and their associates. Indeed corruption of public officials, including border officials, may serve this same purpose. Moreover, the fact that States adopt and implement measures specifically targeted at trafficked persons and persons at risk of trafficking as a group reflects the perception of the existence of that group.

5.2.2.3 Social Visibility Test

Linked to this approach is the so called social visibility test that requires the visibility of a particular group, and individuals within the group, in the particular society. This criterion, developed and applied by the American courts in recent years, can lead to difficulties for trafficked persons who, similar to victims of domestic violence are often invisible and have no interest to promote their situation amongst the general public. Beyond the specificity of trafficking based asylum claims, this requirement has been severely criticised by academic writing in the area, being described as analytically incoherent and as an unreasoned departure from precedent setting cases including *Matter of Acosta*.

Speaking about sex workers, Walker presents an argument as to how sex workers fulfill the second test better than the first test. She accepts that 'it would be no doubt difficult to persuade a court that engaging in prostitution is something that a person should not be required to change'²⁴ and therefore sex workers are likely to fail the immutable characteristic test. However she also notes how 'the historical criminalisation of sex work helped to create a stigmatised class of persons known as

²⁴ Kristen Walker, 'Damned Whores and the Border Police: Sex Workers and Refugee Status in Australia' (2007) 31 Melbourne University Law Review 938, 57

whores or prostitutes. Indeed the availability of several words of negative connotation to identify sex workers supports the argument that sex workers do form a recognisable group within society'.²⁵

Whilst the discussion on the protection needs of 'voluntary sex workers' is beyond the scope of the present research, it is premised that these concerns apply also for trafficked persons who have been exploited in the sex industry. In a UK case, the applicant argued that in Albania 'once a whore, always a whore'. In T98-06186 the Canadian authorities noted how voluntarily entering into the sex trade does not deny the existence or membership of a particular social group. In reaching this decision, the tribunal drew a parallel to whether the voluntary decision to join an unpopular trade union would be used against an individual.²⁶

5.2.3 Grounds Tested and Accepted

A sample of the grounds tested and accepted makes for a number of interesting observations. As this is something where research has been conducted, it will not be the primary focus here, however a number of general observations can be made. One can note that the gender dimension is particularly strong, having been mentioned in the vast majority of cases. However the successful claims have tended to be, in the most part, a lot more focused, identifying other particular characteristics like: former trafficking status, the lack of family protection, nationality and the specific type of exploitation endured.

There is a risk in the gendered way that trafficking continues to be perceived, and that risk comes from its possible ripple effect, especially on male victims of

²⁵ Ibid 956

²⁶ CRDD T98-06186, November 2, 1999

trafficking, or even women, who do not fully subscribe to their victim role. The question is, should they be considered any less vulnerable? On a broader level, this reflects the perception of trafficking. As far as NGOs and academic engagement with the issue goes, there seems to be two key trends. There are those who come towards it from a gender perspective and those who approach from an immigration perspective. Needless to say, on their own, neither of the approaches will adequately address the issue. Not all trafficked persons are women, and not all trafficked persons are migrants either.

Part 3: The Norwegian Model

In 2010 a number of amendments were made to Immigration Law in Norway. One of these included the re-definition of ‘particular social group’ to include former victims of human trafficking.²⁷ This amendment is addressed here as an example of a positive legislative development that can go some way towards rendering refugee protection more accessible to trafficked persons. The relevant provision now reads:

A particular social group shall in particular be considered to consist of a group of people who share a characteristic in addition to the risk of being persecuted, and who are perceived as a group by society. The common characteristic may be innate or for other reasons immutable, or otherwise consist of a manner or belief that is so fundamental to identity, conscience or the exercise of human rights that a person cannot be expected to renounce it. Former victims of human trafficking shall be regarded as members of a particular social group. (emphasis added)²⁸

This provision clearly adopts the cumulative test of MPSG but then specifically addresses the situation of trafficked persons. Various explanations can be suggested

²⁷ Due to language differences, the English version of the act was used during this research. The translation used is updated as of 1 January 2013. The English version does not have legal status, and is not updated continuously.

²⁸ Section 30 (C) of the Norwegian Immigration Act (emphasis added)

for this, including a pre-determined concern that trafficked persons could not fulfill the cumulative test and an acknowledgment of the need for asylum as a channel for the long term protection of trafficked persons.

5.3.1 Historical Context

The legislative proposal notes how:

The Ministry has proposed a provision that former victims of trafficking shall be considered as members of a particular social group, so that persecution aimed at this category will provide a basis for protection.²⁹

This clearly indicates a political will, at the decision making level, to accommodate trafficked persons within the spectrum of international protection. From a politico-legal perspective it is interesting to observe the distinction that the legislative proposal created between trafficking based asylum claims and claims based on gender and/or sexual orientation. The proposal notes how in the latter case it was not advisable to have a specific legal provision covering areas in which the law had already offered protection. The Ministry noted that it

is inappropriate to legislate examples of groups that are considered covered, because this can cause the attention paid to the aforementioned groups without opening for other groups.³⁰

This is interesting considering the on-going mentioning of the qualification directive in the legislative proposal and the reference the latter makes to gender and LGBT whilst not specifically addressing trafficking. In the case of trafficking however the same rule was not applied, and this was justified by the interpretive challenges that arose in the context of trafficking.

²⁹ Ministry of Labour and Social Inclusion, *Proposition No. 75 (2006-2007) On the law on access to the territory and their presence (Immigration)* 29 June 2007 part 5.1.7

³⁰ Ministry of Labour and Social Inclusion (n 25) Part 5.2.1.4

The suggested provision was strongly supported by a wide range of organisations and entities, including the Bishop of Oslo, counter-trafficking organisations, as well as the relevant governmental departments. It was perceived as a way of providing clarity and a degree of certainty that individuals facing a well-founded fear of trafficking will have protection under Norwegian law.

A number of points can be made about this provision. On the issue of MPSG more generally, this provision leaves no doubt as to the combined cumulative assessment of MPSG. The definition of common characteristic is similar to that in the Ward judgment. Whilst not referring to situations immutable by virtue of being historical, these are covered by the reference to 'for other reasons immutable'. The last sentence of the provision is of course the most interesting for the purposes of the present research.

The provision refers to 'former victims' and does not refer to persons at risk of trafficking, or those associated with trafficked persons. The implication therefore is that being a trafficked person meets the required needs for engaging MPSG, but being at risk thereof does not qualify as a result of the non-circularity principle. This issue is also addressed in the UNHCR Trafficking Guidelines that note how:

It should therefore be noted that it is the past trafficking experience that would constitute one of the elements defining the group in such cases, rather than the future persecution now feared in the form of ostracism, punishment, reprisals or re-trafficking. In such situations, the group would therefore not be defined solely by its fear of future persecution.³¹

³¹ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked*, 7 April 2006, HCR/GIP/06/07, para 39

In the latter case, broader groups ought to be assessed, including broader vulnerability factors (see discussion below). There is an implied need in the term ‘former victim’ to sever ties with the trafficker and to be ‘out’ of the trafficking situation. This is an understandable requirement, replicating a similar condition in the 2004 Residence Permit Directive.

In the provision, reference to ‘human trafficking’ refers to the international law definition of trafficking found in the trafficking Protocol, including the various modes of trafficking. This moves away from a debate that limits the application of MPSG to those trafficked for the purpose of sexual exploitation. The vast majority of cases assessed for the purposes of this presentation involved trafficking for the purposes of sexual exploitation, however, as data presented in Chapter 1 illustrates, statistics now indicate that, for instance, in Europe 62% of identified and presumed victims have been trafficked for sexual exploitation, 25% for forced labour and 14% for other forms of exploitation, including criminal activities, removal of organs, selling of children and forced begging.³² This indicates the importance of such a broader understanding of trafficking, including in the context of protection. This is more so when considering that general public awareness still perceives trafficking as limited to sexual exploitation of women, and that women trafficked for sexual exploitation are perceived as ‘better victims’ in that they fit the picture and are more likely to be considered as needing and deserving of international protection. Moreover, trafficking for the purposes of forced labour is more difficult to identify, as those trafficked for these purposes are often better hidden than those engaged in forced sexual exploitation.

³² Based on EUROSTAT statistics for the period 2008-2010. These statistics refer to a global total of 9528 cases. See: European Commission - DG Justice and Home Affairs & Eurostat, *Trafficking in Human Beings* (European Commission 2013)

The provision is also gender neutral and does not refer exclusively to women. This is possibly one of the ways in which the provision moves forward from much of the existing case law that has tended to have a very strong gender component. Whilst that trafficking is a gendered phenomenon cannot be ignored, this provision again acknowledges that trafficking impacts on both men and women. The statistical breakdown quoted above (and illustrated in Chapter 1) notes how 17% of trafficked persons were men whilst 3% were boys. It is believed that the number of male victims is higher despite their not being identified as such by the authorities. Indeed, a man working illegally in a factory is less likely to be identified as a trafficking victim (as opposed to an illegal alien) than someone forced into the sex industry.

In part this move away from the gender dimension is also a reflection on the previous point that all forms of exploitation are covered by the provision. Indeed whilst generalisations should be avoided, women are (believed to be) more often exploited in the sex industry whilst forced labour, with the exception of domestic servitude, has been predominantly performed by men.

The provision does not make reference to where the trafficking has occurred, and therefore may be taken to refer to internal and international trafficking, whether or not this has occurred in Norway itself, in the country of origin or in a third country. It is not only former victims of trafficking in Norway that are considered to form a particular social group. There is an indication therefore that the limitation to 'former victims' is linked to the non-circularity principle rather than other considerations.

One positive dimension to this provision is that it does not mention any form of collaboration with the authorities and the status determination authorities can make the determination of victim status irrespective of other authorities. This in

turn calls into question the issues of capacity of the decision making authorities to identify trafficked persons, including those that do not fit the 'Natasha' image. One research participant noted how, in Norway, whilst not all members of the teams would be specifically trained, each relevant team would have at least one official trained specifically on trafficking issues. There is also no time limitation. The provision is not limited to those claiming asylum right after their trafficking experience.

Another question relates to whether some form of attestation/certification of being a victim of trafficking is required. This question can be determined in the negative as the internal notes clearly indicate that if the adjudicator determined that the applicant is a former victim of trafficking, he does not need to define MSPG any further. This in turn calls into play the need to have adequately trained status determination officers who will be expected to carry out both asylum related duties, and also trafficked person identification in line with established national and international standards.

A possible implication of the provision is that missing major improvements in the country of origin, and applying the principles set out in previous chapters, trafficked persons will have a direct access route to international protection. Former victims of trafficking will have access to protection unless the Court or Tribunal is satisfied that there have been considerable developments in their countries of origin, based on the presumption ensuing from their past experiences.

5.3.2 Limitations

One issue that can be considered a limitation is the fact that the provision refers exclusively to 'former victims'. This is an interesting limitation considering that the legislative proposal makes reference to the UNHCR guidelines that explicitly refer to 'victims of trafficking and persons at risk of being trafficked'. This notwithstanding the distinction is understandable not least by the diverging 'criteria' that each meet. Whilst for former victims it is the shared experience of having been through a trafficking experience that meets the requirements of the MPSG category, for those at risk of being trafficked the risk is based on their vulnerability and it is therefore a more complex set of circumstances, many of which might still meet the requirement of MPSG.

Arguing that 'persons at risk of being trafficked' are, per se, members of a particular social group will fall foul of the non-circularity requirement which states that a MPSG must not be united exclusively but by their shared fear of persecution. Whilst past experience provides an experience that is at the same time a cause of, but also independent of, the persecution suffered, the same cannot be said for persons 'at risk of being trafficked.' This is highlighted in the extract quoted above from the UNHCR Trafficking guidelines.

Such claims can however be argued on the basis of the broader grounds of vulnerability much in the same way that similar claims are argued in other jurisdictions. In such cases the persecution would be trafficking based, but the Convention ground would rely on gender, age, or specific forms of vulnerability.

Another group relates to those associated to trafficked persons including family members. A sub-provision notes how:

In the assessment of whether there is a well-founded fear of persecution it is immaterial whether the applicant actually possesses the characteristics or the opinion that leads to persecution, provided that such a characteristic or opinion is attributed to the applicant by the actor of persecution.³³

Indeed family membership has been considered to be a particular social group and as such can be used in such cases. This was raised as an issue in RRTA 794, which involved the joint case of a woman trafficked for sexual exploitation and her partner. The tribunal determined that the applicant did not fulfill the requirements of the refugee definition. Two specific formulations of MPSG were attempted in this regard (both failed):

- Albanian male who has married a former prostitute
- Albanian national who has fallen foul of the Albanian/mafia prostitution ring.

Another question that arises refers to the justification for the provision. Was the need to introduce the specific provision a reflection of doubt whether trafficked persons could be accommodated within the restrictive approach to MPSG. Some indications to an answer to this question are found in the legislative proposal which clearly indicates, on the one hand a reluctance to be overly specific (in order to avoid closing off the ground to listed groups) and on the other the acknowledgement that there was scope for doubt and complications in the application of the ground to trafficked persons. A practice note dating from before the enactment of the legislation clearly indicates that the new legal provision had

³³ Section 30 of the Norwegian Immigration Act 2010

little to no impact on practice in the area. It also indicates that the dual test (immutable characteristic and social perception) was met in most cases by trafficked persons. What is of particular interest is the focus of the practice note on trafficking for the purposes of forced prostitution.

5.3.3 The Norwegian Model as Promising Practice

The question that arises therefore is whether the Norwegian model is indeed a promising practice and the answer to this can only be in the affirmative, if for no other reason, for the potential it has to avoid inconsistencies in the determination of whether trafficked persons are indeed MPSG. As one research participant (Norwegian lawyer focusing on trafficking) highlighted: it is extremely difficult to assess whether making it a MPSG has in fact changed anything in practice. In assessing the impact of the provision, this chapter premises that, in the large part, Norwegian cases post 2010 focus on establishing a well-founded fear of persecution, whilst a substantial number of cases from other jurisdictions focus, in full or in part, on establishing MPSG. This is confirmed through an analysis of the case law.

When asked about the international dimension of the provision, i.e. whether Norway promotes the development of similar provisions in other jurisdictions and/or in international fora, a UDI representative noted:

Through our participation in various international networks, UDI shares information about the Norwegian practice in asylum cases based on trafficking, including the definition of the particular social group in the Norwegian Immigration Act. UDI does not, however, have a role in influencing the political development in other countries.³⁴

³⁴ Email dated May 14th 2013. On record with the author.

The impact of such efforts however remains to be seen. Whilst trafficked persons were clearly a consideration on the minds of the EU when the qualification directive was being drafted, they failed to adopt the Norwegian model. This therefore suggests that the reluctance to include it is a deliberate decision. Trafficked persons are explicitly mentioned in the directive as a particularly vulnerable category of migrants but whilst LGBT and others were specifically mentioned as a particular social group, trafficked persons were not.

Part 4: Convention Grounds beyond MPSG

Whilst most of the cases assessed in the course of this research have relied on Membership of a Particular Social Group as the grounds for persecution, it is argued here that at least another 3 of the grounds are relevant, namely: race, religion and, with regard to activist claims, political opinion. We focus here on race (broadly understood) as a Convention ground of relevance to trafficking based claims and we briefly also outline some of the political opinion claims that might arise. This furthers the core suggestion raised above that trafficking based asylum claims can, and should, be considered beyond the ‘membership of a particular social group’ ground as other grounds may also be relevant.

5.4.1 Race

Whilst much written work will draw parallels between race, racial discrimination and trafficking, there has been little work that looked into the intersection in any meaningful way beyond the mere anecdotal. A focus on race as a relevant ground in trafficking based claims helps shift attention away from the gendered perspective on trafficking. One thing is clear. There is little to no hard knowledge on the inter-

relations between trafficking and race, and what information is available is largely speculative and based on known assumptions. Greater efforts ought to be undertaken in understanding the racial dynamics that underpin human trafficking. What is also clear is that such underpinnings will vary by region. For instance, issues of caste and class are far more prominent when discussing trafficking in South East Asia than they are in other regions.³⁵

Much like other terms in the Convention, the term race is not without definitional issues especially in terms of setting the contours of its meaning. The EU Qualification Directive provides that:

The concept of race shall, in particular, include considerations of colour, descent, or membership of a particular ethnic group.³⁶

The UNHCR Handbook provides similarly expansive wording:

Race, in the present connexion, has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as “races” in common usage.³⁷

This broad interpretation is also supported in academic writing. Grahl Madsen associates the use of the term race with social prejudice rather than a more or less scientific division of mankind, highlighting that within the context of the refugee definition race is ‘more a social than an ethnographic concept’.³⁸

³⁵ See: Renu Rajbhandari, Sally Cameron and Edward Newman, ‘Human trafficking in South Asia: A focus on Nepal’ in Sally Cameron and Edward Newman (eds), *Trafficking in Humans* (United Nations University 2008)

³⁶ Article 10(1)(a)

³⁷ UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3 para 68

³⁸ See: Andreas Zimmermann, Jonas Dörschner and Felix Machts, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A commentary* (Oxford University Press 2011) 377

Race and ethnicity impact on susceptibility to being trafficked in multiple ways. First, particular ethnic backgrounds are more highly demanded in specific contexts, especially with regard to the sex industry. This may be explained by socio-culturally engrained notions of sexual attractiveness and as an assessment of trafficking through the economic lens of supply and demand. As one brothel client told Kempadoo; 'if she's light-coloured, then she is sexually attractive to this population.'³⁹ Truong notes how in sex tourism and related prostitution, the instrumental construction of the body around notions of race, ethnicity and culture is used to activate the desire of potential buyers.'⁴⁰ Research by Human Rights Watch found that Indian brothels preferred Nepali women 'for their reputation for sexual acquiescence and their golden skin'.⁴¹ The curacao sex industry in the Caribbean is reportedly structured along a race/skin colour hierarchy descending from white European to light-skinned Colombian and Dominican women to local Afro-Caribbean women.⁴² These notions will vary by country or region, and specific traffickers will likely target specific populations based on their client's demands, as well as their own access to specific communities. Women from other cultural groups are considered (and often portrayed) to be docile and obedient, as reflected in greater demand in the context of trafficking for forced marriage and the mail order bride systems,⁴³ as well as in the sex industry more broadly.⁴⁴

³⁹ Kamala Kempadoo and Joe Doezema, *Global Sex Workers: Rights, Resistance, and Redefinition* (Routledge New York 1998) 131

⁴⁰ Thanh-Dam Truong, 'Human Trafficking and Organised Crime' (2001) 339 ISS Working Paper Series/General Series 1, 9

⁴¹ Human Rights Watch, *Rape for Profit: Trafficking of Nepali Girls and Women to India's Brothels* (Human Rights Watch 1995)

⁴² Sally Cameron and Edward Newman, 'Trafficking in Humans: Structural factors' in Sally Cameron and Edward Newman (Eds.) *Trafficking in Humans: Social, Cultural and Political Dimensions* (United Nations University Press 2008) 46

⁴³ See generally: Jackie Jones, 'Trafficking Internet Brides' (2011) 20 Information & Communications Technology Law 19

Particular cultural practices will also heighten vulnerability. For instance in some communities sending a child to live with a family member or acquaintance is more socially acceptable than it is elsewhere. Research in Latin America found that indigenous people are amongst the most at risk of trafficking and exploitation. Beliefs of racial superiority will sometimes explain the enslavement of others. Research into sex work has significantly shown the desire, express or implicit, of clients to exert their power over the sex workers, a situation which can also include racist undertones. One research participant from the 'untouchable' caste participating in a research project in Nepal is reported as explaining being forced into prostitution by men of higher caste and told that this was her 'caste occupation'.⁴⁵ Moreover, in times of conflict, especially ethnic based conflict, trafficking is used as a way to punish or intimidate specific groups. The conflict in Bosnia and the extensive sexual enslavement of Muslim women and girls is but one example of this phenomenon. Some manifestations of trafficking have been particularly targeted at specific communities. For instance, the trafficking of pregnant women for the purposes of selling their babies abroad, through informal and illegal adoption channels, has been primarily focused on Roma women. One can also refer to various United States' Trafficking in Persons Reports that report on the risks of trafficking for forced begging faced primarily by Roma children.⁴⁶

More generally, however, racial discrimination limits an individual's options in terms of education and employment thereby heightening their risks and vulnerability to trafficking. Racial discrimination in employment is well documented across many

⁴⁴ Cameron and Newman (n 39) 46

⁴⁵ Bal Kumar and others, 'Trafficking in Girls With Special Reference to Prostitution: A Rapid Assessment' (ILO 2001)

⁴⁶ See for instance: United States Department of State, *Trafficking in Persons Report* (UNDOS 2013)

countries. In Europe, despite extensive legal and policy measures to combat discrimination, and significant funding being invested in such efforts, research by the Fundamental Rights Agency found extensive discrimination faced by ethnic minorities in accessing employment across the European Union. Specific communities, most notably the Roma community, were particularly affected by such discrimination as reflected in the disproportionately high unemployment rate. The research found that within the European Union every second Roma respondent was discriminated against at least once in the previous 12 months, and that Roma who were discriminated against experienced on average 11 incidents of discrimination over a 12-month period. This snapshot goes some way into outlining how being of Roma ethnic background increases the likelihood of trafficking.

Research with the Roma community in five European Union Member States refutes the idea that trafficking is a cultural practice of the Roma or that there is a 'unique Roma vulnerability factor' but found that:

Roma are highly vulnerable to trafficking due to structural forms of ethnic and gender discrimination, poverty and social exclusion which result in low educational achievement, high levels of unemployment, usury, growing up in state care, domestic violence affecting predominantly women and children and substance abuse. Furthermore, many of the vulnerability factors such as domestic violence, high school dropout rates, homelessness or being in state care affect children and youth exclusively or disproportionately.⁴⁷

Moreover, race issues will often overlap with issues of national citizenship and access to rights. For instance, research by UNESCO in the Mekong Region describes lack of citizenship as 'the single greatest risk factor for hill tribe women in Thailand

⁴⁷ European Roma Rights Centre, *Breaking the Silence: A Report by the European Roma Rights Centre and People in Need – Trafficking in Romani Communities* (European Roma Rights Center (2011) 12

being trafficked'.⁴⁸ Within the notion of race, caste distinctions will also impact vulnerability to trafficking. Kumar's research in Nepal found that 'lower caste people face economic exploitation, social discrimination and a high risk of sexual exploitation'⁴⁹ leading Cameron and Newman to conclude that 'location within the caste system has a direct relationship to earning potential and poverty, and consequently to vulnerability to trafficking'.⁵⁰

Race dynamics in human trafficking (in terms of vulnerability, targeting and lack of protection) will vary depending on the country where the recruitment happens, the country where the exploitation takes place, the desires of the client base, the nature of the criminal enterprise involved, the reach of the trafficker and his/her associates, the industry in which one is to be exploited and the type of work that will be expected of the trafficked person. This is similar to how gender, age and other vulnerability factors come into play.

Discrimination(s) that will heighten vulnerability to trafficking include: direct, indirect and systemic discrimination all of which, in different yet inter-related ways, will result in the exclusion of particular groups from the protective frameworks of society. This heightens their vulnerability to trafficking by making them easier targets for traffickers whilst at the same time reducing the risks of prosecution and punishment for traffickers. The social, political and legal marginalisation of particular groups of people often means that traffickers can act with impunity, and it is clear that they are well aware of this possibility.

⁴⁸ See: Cameron and Newman (n 39) 43

⁴⁹ Kumar (n 42) 45

⁵⁰ Cameron and Newman (n 39) 44

One key challenge in identifying a racial ‘motive’ behind the crime is the lack of specific data. Despite a growing awareness of specific manifestations of trafficking that are predominantly linked to the Roma community, data on these phenomena are missing, in part explained under the pretext of data protection and the avoidance of race segregation. It may therefore be difficult for lawyers and representatives to argue that the applicant’s racial or ethnic background was a factor in his or her vulnerability to trafficking.

As noted above, for the purposes of meeting the Convention ground requirement in refugee law, race and racial discrimination need to be either the reason for the persecution itself, or for the failure of State protection. Racial and ethnic minorities will often face discrimination by law enforcement and the system more broadly and may not be protected against threats of trafficking. They may feel that going to the police or the authorities will not result in anything.

For instance, research by the European Roma Rights Coalition and Persons in Need (a Slovakian based NGO) found, in researching the vulnerability of Roma communities to trafficking, that the important role played by the police in the identification of trafficked persons may constitute a barrier for the identification of Roma trafficked persons as a result of recurrent police ill-treatment and profiling of Roma, fear and a lack of trust in police among Roma, and a general lack of confidence among Roma in the legal system.

5.4.2 Multi-Ground Applications

The fact that the Convention allows for multiple grounds to be sought at the same time allows for greater acknowledgement of the intersectionality approach.

‘Intersectionality’ ‘is an analytical tool that examines the ways in which different identities converge and how they produce distinct experiences (..). The goal is not to identify and list multiple grounds as compound factors but rather to understand the full context and experience of vulnerability. This methodology is particularly relevant while assessing the situation of trafficked persons, particularly of trafficked women, very often affected by both multiple dependencies and multiple discrimination’.⁵¹

This reflects the fact that the phenomenon of trafficking is intrinsically multi-dimensional. Indeed ‘multiple identities reflecting race, migration status, national or ethnic origin, gender, age, and other grounds often intersect in ways that reinforce trafficked persons’ vulnerability, and that require specific and targeted responses’.⁵²

Part 5: Concluding Remarks

In conclusion it can be argued that the provision under Norwegian law represents a tool for clarification rather than a new perspective. It allows what has been achieved clumsily through case law to be simplified and for greater consistency to develop in status determination processes. It also curtails the possibility of restrictive interpretations of the MPSG criterion which can be used to exclude certain trafficked persons from protection. Further developments in the broader field of MPSG would however need to be maintained in order to ensure that those at risk of trafficking and those associated with trafficked persons can also be protected.

⁵¹ OSCE, *An Agenda for Prevention of Human Trafficking: Non-Discrimination and Empowerment: Concept Note* (OSCE 2012) 5; For more on this see: Kimberle Crenshaw, ‘Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics’ (1989) *The University of Chicago Legal Forum* 139; Kimberle Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color’ (1991) *Stanford Law Review* 1241; Kimberle Crenshaw, ‘Whose Story is it anyway? Feminist and Antiracist Appropriations of Anita Hill’ in Toni Morrison (ed.), *Race-ing Justice, En-gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality* (Pantheon Books 1992) 402

⁵² OSCE (n 48) 5

Provisions similar to this have potential in terms of policy coherence. A critical issue in the area of trafficking has been the lack of cohesiveness in policies and practices having a direct impact on trafficking. If the broader goal of 'victim protection' is to be achieved, then strengthening the links between trafficking and asylum, and facilitating trafficked persons' access to international protection should be considered a priority. Whilst it might be preferable from a gendered asylum perspective to have more cases of gender being deemed to be a MPSG from the broader perspective of trafficking, an over-emphasis on gender might result in an unfair bias against trafficked men. This is heightened by the further difficulty in proving that those trafficked for non-sexual types of exploitation are also members of a particular social group.

Furthermore, this chapter has also highlighted the relevance of Convention grounds beyond the MPSG category, most notably by reflecting on the relevance of race in the context of trafficking. Racial and ethnic background, it has been identified, increase the vulnerability to trafficking, impact on the targeting by traffickers and influence access to protection.

Chapter 6: Exclusion and Revocation

Having analysed situations in which trafficking provides a basis for recognition of refugee status, this chapter assesses the application of exclusion and revocation clauses in trafficking based asylum claims. Exclusion clauses refer to provisions within refugee law instruments that preclude an individual from recognition as a refugee, and in particular Articles 1(F) of the Geneva Convention and similar provisions in the regional instruments including: Article 12 of the 2011 Qualification Directive, Article 5 of the OAU Refugee Convention, and Article 2 of the Arab Refugee Convention.¹ Revocation clauses, on the other hand, apply after such recognition in order to deprive the individual from that recognition or its benefits and can be found in, *inter alia*, Article 19 of the Qualification Directive. Similar to such clauses, the Geneva Convention allows for exceptions to the application of the non-refoulement principle through Article 33(2).

Exclusion and revocation clauses have three core aims: precluding those deemed undeserving from receiving the benefits of international protection, preventing such benefits being granted to fugitives from justice and safeguarding national security.² In the context of trafficking it contributes also to the international cooperation between States for the prosecution of trafficking offences by negating safe haven to traffickers. This is also a goal of the anti-trafficking instruments. It is important to note however, that where the risk of persecution amounts to a violation of Article 3

¹ For a comparative overview of the exclusion clauses under the various regional refugee law instruments see: Jean-Pierre Gauci, 'Regional Models of Asylum: A Comparative Overview', Magister Juris in International Law (University of Malta 2010)

² For further analysis see: Andreas Zimmermann and P. Wennholz, 'Article 1D - Definition of the Term Refugee' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (OUP 2011)

of the European Convention on Human Rights or the Convention Against Torture, return to such country would still be prohibited under the broader human rights framework and in particular the principle of non-refoulement.

The two provisions – namely Article 1(F) and Article 33(2) – are closely related but should not be considered as one and the same. Hathaway and Harvey critique the UNHCR's view that the two are supplementary by or through arguing that the two serve complementary but distinct purposes.³ A key difference is that the exclusion enshrined in Article 1(F) is mandatory (shall not apply) whilst that in Article 33(2) allows discretion to the State.

This chapter makes two core claims. First, perpetrators of trafficking (traffickers) can be excluded from refugee protection (exclusion or revocation) because of the serious nature of the crime of trafficking. Second, trafficked persons who have committed serious crimes under the influence of their traffickers should be exempted from such exclusion and revocation as an extension to the non-penalization principles affirmed in legally and politically binding trafficking instruments.

This chapter is organised as follows. Part 1 discusses whether, and the conditions under which, trafficking can be considered a war crime or a crime against humanity, with a particular focus on the relevance of the Rome Statute of the International Criminal Court. Part 2 deals with trafficking as a serious non-political crime of sufficient severity to activate the exclusion and revocation provisions. Part 3 shifts the attention onto trafficked persons who commit serious crimes. It first outlines the

³ James C Hathaway and Colin J Harvey, 'Framing Refugee Protection in the New World Disorder' (2001) 22 Immigration and Nationality Law Review 191

types of crimes which might arise in these situations, then elaborates the principle of non-penalization as enshrined in the binding European anti-trafficking instruments and soft law instruments of global reach. It then focuses the discussion on the relevance of these provisions to trafficking based asylum claims, highlighting the various ways in which these provisions can inform and impact such claims. Part 4 discusses the grey areas between traffickers and trafficked persons, problematizing the either/or differentiation and highlighting the need for case-by-case determination of claims. It sets out a number of scenarios that might offer significant challenges in this regard.

The following scenarios highlight the relevance of the discussion in this chapter. A first example involves an individual who is responsible for trafficking within the context of an armed conflict. When his party loses the war, he flees his country seeking asylum elsewhere. The second refers to a refugee, recognised as such under international law who is convicted for crimes of trafficking committed after his/her recognition as a refugee. The third example is of a refugee who is recognised as such, and who finds him/herself trafficked and forced to commit a serious crime for which he/she is charged in court.

Article 1F of the Geneva Convention provides that:

The provisions of this Convention shall not apply to any person with regard to whom there are serious reasons for considering that

- a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.
- b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

The first two of these are of particular relevance to the present discussion. It must be noted that this provision does not require a conviction but rather that the State where asylum is being sought has 'serious reasons for considering' that the applicant was involved in such acts. Closely linked to this is Article 33(2) that effectively excludes from the application of the principle of non-refoulement those who have been convicted of a serious crime committed in the country of asylum. It provides:

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Closely linked to this is the fact that the European Union Qualification Directive allows for exclusion, non-renewal or revocation of refugee status in similar situations. It provides:

Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.

5. In situations described in paragraph 4, Member States may decide not to grant status to a refugee, where such a decision has not yet been taken.

Part 1: Crimes Against Humanity and War Crimes

Many of the worst practices associated with armed conflict can be described within the paradigm of trafficking.⁴ These include *inter alia* the recruitment of child

⁴ Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 209

soldiers,⁵ enlistment of civilians into highly exploitative labour situations and organised forced prostitution. As noted elsewhere in this thesis, conflict situations create extreme vulnerability to human trafficking especially, but certainly not exclusively, for women and children. In times of conflict, situations arise of military abductions and enslavement both for sexual services and forced labour as well as the forced recruitment of combatants, including by warlords and militias.

Article 1F of the Geneva Refugee Convention provides that:

the provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

This section assesses whether, and the circumstances under which, trafficking can be considered as a war crime or a crime against humanity and the consequent application of Article 1F. It looks at two inter-connected issues: whether trafficking qua trafficking is a crime against humanity and second whether particular manifestations of trafficking are themselves war crimes or crimes against humanity including in particular sexual slavery and enforced prostitution.

The place of trafficking qua trafficking within the framework of crimes against humanity is uncertain, lacking formal determination by the International Criminal Court or any other of the International Criminal Courts⁶ and also subject to contradictory academic perspectives. Article 7 of the Rome Statute includes a list of

⁵ See also: Sandrine Valentine, 'Trafficking of child soldiers: Expanding the United Nations Convention on the Rights of the Child and its Optional Protocol on the Involvement of Children in Armed Conflict' (2003) 9 *New English Journal of International and Comparative Law* 109

⁶ Hall remarks how there is no jurisprudence by any of the international criminal courts in this regard. See: William Schabas, *The International Criminal Court: A Commentary on the Rome statute* (Oxford University Press, 2010)

crimes against humanity that includes, *inter alia*, enslavement. This builds on the inclusion of enslavement as a crime against humanity in the Charters of the International Military Tribunals of Nuremburg⁷ and for the Far East⁸, and the Statutes of the ad hoc International Criminal Tribunals for the Former Yugoslavia⁹ and for Rwanda.¹⁰ Unlike its predecessors, the Statute defines enslavement as:

The exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.

This definition therefore adopts the Slavery Convention's definition of slavery (to which reference has been made in Chapter 1) supplementing it by an explicit reference to human trafficking. A reference to sexual exploitation in earlier drafts of the statute was removed from the definition, bringing this provision in line with current thinking on trafficking as covering other forms of exploitation, including forced labour and the removal of organs.¹¹ A flexible interpretation of this provision has gained currency and is adopted by Mattar, Bedont, and Scarpa amongst others. Mattar and Scarpa assert that the Statute explicitly recognises trafficking in persons as a crime against humanity¹² whilst Bedont argues that the Statute established a definition of enslavement that includes trafficking.¹³ Hall argues that 'if this provision, added on the initiative of Italy, is to have any meaning at all, then the

⁷ Article 6 (C)

⁸ Article 5 (C)

⁹ Article 5 (C)

¹⁰ Article 3 (C)

¹¹ It is interesting to note the timing of the negotiations and adoption of both the Rome Statute and of the Trafficking Protocol. The overlap in timing may provide an explanation for various things including the broadened definition of trafficking in this context

¹² Mohammed Y. Mattar, *The International Criminal Court (ICC) Becomes a Reality: When Will the Court Prosecute The First Trafficking in Persons Case?* (The Protection Project 2002); Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (Oxford University Press 2008) 126. She notes: 'For the first time in an international criminal law treaty, trafficking in persons has been explicitly mentioned in the definition of enslavement and considered as a crime against humanity'

¹³ Barbara Bedont, 'Gender-Specific Provisions in the Statute of the International Criminal Court' in Flavia Lattanzi & William A. Schabas (eds), *Essays on the Rome Statute of the International Criminal Court* (Il Serente 1999) 183

concept of exercising the powers of ownership must be given a broad reading'.¹⁴

A more conservative, but more legally defensible interpretation is provided by Gallagher in stating that the statute foresees that the (undefined) act of trafficking in persons can be a *vehicle* for the exercise of a power attaching to the right of ownership of the kind required to constitute enslavement.¹⁵ She notes however that this direct mention of trafficking in the Statute is an important measure precluding perpetrators from relying on the restrictive slavery definition to avoid responsibility. Jean Allain, in turn, argues that the link is to be found in 'slavery' as one of the possible means of exploitation within the context of trafficking.¹⁶

Whilst being more conservative, this is an interpretation which best reflects the wording of the provision. It creates a circular requirement – trafficking is enslavement if it is enslavement (that is if it meets the requirement for enslavement – exercise of any or all of the powers of ownership) and if so, it is a crime against humanity. In this conservative reading, the explicit mention of trafficking adds little to the general framework except for identifying the possibility of trafficking as a manifestation of enslavement and ensuring that responsibility cannot be evaded.

On the point of whether and when trafficking amounts to enslavement, the decisions of the European Court of Human Rights are instructive. As noted elsewhere in this research, the court has held that trafficking in persons, as defined in the international anti-trafficking instruments, falls squarely within the Article 4 prohibition, and as such it can be argued that the gap between trafficking and

¹⁴ Otto Triffterer and Kai Ambos, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck Munich 2008)

¹⁵ Gallagher, *The International Law of Human Trafficking* (n 4) 216

¹⁶ Allain J, 'Trafficking in Human Beings: Modern slavery' (2009) 20 *European Journal of International Law* 453

enslavement has been narrowed, if not closed, albeit not by the international criminal court.

For enslavement to constitute a crime against humanity it must be committed as part of a widespread or systemic attack¹⁷ directed against any civilian population and in pursuance, or furtherance, of a State or organisational policy.¹⁸ Further guidance on this point will have to await judicial determination by the ICC.¹⁹ Such elaboration will hopefully not elude us for long. Enslavement and sexual enslavement are charges brought against officials of the lords' resistance army, however this case is still pending as the accused have not yet surrendered to the court.²⁰ Stories have emerged of girls kidnapped by the LRA forced to carry heavy loads, finding and cooking food and forced to become LRA 'wives'.²¹

The discussion of the trial and appeals chamber in the Kuranac case before the International Criminal Tribunal for the Former Yugoslavia is interesting in this regard. The court upheld the traditional definition of slavery, noting that modern forms of slavery still required a destruction of juridical personality and the distinction from 'chattel slavery' is merely one of degrees. This is an important decision for anti-

¹⁷ Scarpa (n 13) 126

¹⁸ Article 7(1) provides: For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic (other places you used "systemic") attack directed against any civilian population, with knowledge of the attack (a) Murder; (b) Extermination; (c) Enslavement; why all the question marks? (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character, intentionally causing great suffering, or serious injury to body or to mental or physical health

¹⁹ Gallagher, *The international law of human trafficking* (n 4)

²⁰ See: ICC, 'Warrant of Arrest for Joseph Kony, issued on 8 July 2005, as amended on 27 September 2005'

²¹ Alexis Okeowo, 'How the Lord's Resistance Army Forced Captives to Become Couples' (July 2013 Financial Times Magazine)

slavery legislation generally, but also in terms of bridging the gap between trafficking and slavery.

Trafficking qua trafficking can therefore be a crime against humanity provided it meets the requirements established in the definition of enslavement, namely the exercise of all or any of the powers attaching to the right of ownership. This does not go very far in clarifying the situation, but rather renders the explicit reference to trafficking in the ICC Statute politically meaningful yet legally redundant.

Moreover, a number of acts that constitute trafficking also fall under other crimes listed in Article 7 of the Rome Statute. These include: forced prostitution²² or other forms of sexual slavery,²³ as well as broader crimes such as committing outrages upon personal dignity, in particular humiliating and degrading treatment and forced transfer.²⁴ Rape, now well recognised in international humanitarian and criminal law, is also an inherent part of trafficking for sexual exploitation.²⁵

Furthermore, a number of the war crimes listed in the Statute²⁶ can also be linked to specific manifestations of trafficking. These include: sexual slavery, enforced prostitution, rape,²⁷ recruitment of child soldiers (under the age of 15),²⁸ torture or inhuman treatment,²⁹ wilfully causing great suffering, or serious injury to body or health,³⁰ unlawful transfer or confinement,³¹ and committing outrages upon

²² Article 7(1) G

²³ Ibid

²⁴ Article 7 (2) D

²⁵ See in this regard: Rosalind Dixon, 'Rape as a Crime in International Humanitarian Law: Where to From Here?' (2002) 13 *European Journal of International Law* 697; Theodor Meron, 'Rape as a Crime Under International Humanitarian Law' (1993) 87 *The American Journal of International Law* 424

²⁶ Set out in Article 8 of the Statute

²⁷ Article 8(b) xxii

²⁸ Article 8(b) xxvi

²⁹ Article 8(a) ii

³⁰ Article 8(a) iii

³¹ Article 8(a) vii

personal dignity, in particular humiliating and degrading treatment.³² By definition, war crimes can only be committed in the context of armed conflict. International Humanitarian law does not make explicit reference to trafficking, however the Geneva Conventions do prohibit outrages upon personal dignity, in particular inhumane and degrading treatment or punishment and enforced prostitution.³³

The inclusion of trafficking in the context of the ICC Statute has a strong political as well as a legal meaning. It re-enforces the message that crimes relating to trafficking are amongst the most atrocious and in direct violation of the rights of trafficked persons, and that the international community is willing to come down hard on those responsible for them. The application of the Statute will of course also necessitate all the other elements of crimes to subsist, including for instance that the actions take place as part of, and with the knowledge of, a widespread and systemic attack against a civilian population. No cases of this kind were assessed in the course of this research. However it is not unreasonable to believe claims, where these issues will arise, will emanate in the future especially considering the growing awareness of trafficking in times of conflict, greater accountability for crimes against humanity and improved chances of detection for traffickers in these situations.

³² Article 8 (b) xxi

³³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, done June 8, 1977, entered into force Dec. 7, 1978 (Additional Protocol I), at Art. 75. See similarly Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, done June 8, 1977, entered into force Dec. 7, 1978 (Additional Protocol II), at Art. 4; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, done Aug. 12, 1949, entered into force Oct. 21, 1950 (Fourth Geneva Convention), at Art. 3(2)

Part 2: Trafficking as a Serious Non-Political Crime

Human trafficking does not only exclude persons from refugee protection when meeting the threshold of crime against humanity or a war crime. The Refugee Convention also excludes from protection persons who are believed to have committed serious non-political crimes before arriving in their country of asylum.

Article 1F(b) of the Convention provides that:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that he has committed a serious non-political crime outside of the country of refuge prior to his admission to that country as a refugee.

The term ‘prior to his admission’ is further defined by the Qualification Directive as referring to any period of time before the issuance of a residence permit on the basis of refugee status and can therefore include such periods of time as are spent in the country before applying for recognition as a refugee. Conviction for serious crime can also be the basis for exclusion from, or revocation, of refugee status under the Qualification Directive. Article 14 provides that

Member States may revoke, and or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when he or she, having been convicted, by a final judgment, of a particularly serious crime, constitutes a danger to the community of that Member State.³⁴

Moreover, Member States may decide not to grant refugee status to a person in such a situation where this hasn’t already been done.³⁵ There is no doubt that human trafficking is considered to be a serious crime, as reflected by the growing international and national efforts to combat it, the penalties ascribed to it and the

³⁴ Article 14(4)

³⁵ Article 14(5)

strong human rights dimension inherent in trafficking. The efforts and statements of international organizations This includes trafficking for all forms of exploitation and includes both internal and international trafficking. The serious nature of trafficking therefore brings traffickers within the purview of the exclusion and revocation clauses. Unlike the discussion above around war crimes and crimes against humanity, there are few other requirements in this regard except for the crime of trafficking itself. If the challenge to the (or) a refugee status is based on trafficking occurring within the country of asylum, then a final conviction is required.

Part 3: Trafficked Persons who commit Serious Crimes

Having discussed the possible exclusion of traffickers from refugee status, in this section we now move on to assess any provisions and measures aimed at shielding trafficked persons from similar exclusion with regard to crimes committed whilst under the influence and/or control of their trafficker(s). This is increasingly relevant considering the growing prevalence globally of trafficking for the purposes of exploitation through enforced criminality, and the seriousness of the crimes in which trafficked persons are coerced or deceived into participating. This is now recognised as one of the means of exploitation in the context of trafficking.³⁶

Offences committed within the context of trafficking may include trafficking related offences (such as recruitment), status related offences (such as possession of fake documentation), as well as other crimes committed as a result of the exploitation including: pick pocketing, street robbery, shop lifting, metal theft, burglary, drug

³⁶ Article 2 of the Trafficking Directive which provides: exploitation shall include, as a minimum, the exploitation of (or [or] for) the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the **exploitation of [is this “of” or “for”] criminal activities**, or the removal of organs (emphasis added)

trafficking, cannabis cultivation, drug muling, forced begging, benefit and insurance fraud, selling fake and counterfeit goods, sham marriages and illegal adoption. Moreover, it is likely that other areas will be identified in the future.³⁷ Not all of these manifestations of trafficking amount to serious crimes for which the exclusion or revocation clauses in refugee law would apply. However some are, and in particular the drug trafficking related offences (specifically, cannabis cultivation is often associated with Vietnamese young persons) are considered serious offences resulting in automatic deportation.

By way of context, data available for the UK indicates that between January and September 2011 about a quarter of all children trafficked in the UK (total of 202) were trafficked for the purposes of exploitation of criminality. Twenty three (23) children had been trafficked for the purpose of benefit fraud, twenty one (21) for cannabis cultivation and thirteen (13) for other forms of forced criminality.³⁸ Operation Gulf³⁹ found that a single child trafficked into the UK can earn up to GBP 100,000 in a year.⁴⁰ The exploitation of the criminality of trafficked persons also establishes further levels of control, by creating a fear of prosecution in the trafficked person, providing the traffickers with a further tool to control and intimidate them.

Annison outlines two broad ways to understand the relationship between the trafficking and the criminal offence, namely the duress model and the causation model. In the former the trafficked person is compelled by force or threat to commit

³⁷ Rachel Annison, *In the Dock: Examining the UK's Criminal Justice Response to Trafficking* (The Anti-Trafficking Monitoring Group 2013) 92

³⁸ Ibid

³⁹ Operation Gulf involved joint investigations into trafficking of Romanian children into Western Europe, primarily the UK. It involved the London Metropolitan Police and the Romanian Police.

⁴⁰ See: ECPAT-UK, *Discussion Paper - Child Trafficking for Forced Criminality* (ECPAT-UK 2010)

the offence, whilst in the latter there is a connection between the trafficking scenario and the offence.⁴¹ The distinction between the two is blurred by the levels of control and violence exercised within the context of trafficking and the denial of the possibility of consent in that scenario. Trafficked persons who commit crime further complicate the intersection between the security continuum and the humanitarian prerogatives, making the trafficked persons both ‘victim’ and ‘perpetrator’, both a ‘cause’ and a ‘consequence’ of insecurity. This is even further complicated when the crime of which the individual is suspected is trafficking in persons itself, including for instance, recruitment of new people for exploitation by the criminal networks.

The recognition of exploitation of criminality as a mode of exploitation, is an important step towards realising the trafficked-person (read: victim) centred approach to counter-trafficking. Its impact on the broader legal system, including the criminal justice system, is a process still in the making. The implications of the non-criminalisation provisions highlight an intersection between principles of criminal law and provisions of international protection.

6.3.1 Relevance of Non-Criminalisation Principle

As Gallagher notes: ‘criminalisation is the anti-thesis of a victim-centred approach, inevitably operating to deny trafficked persons the rights to which they are entitled under international law’⁴² The principle of non-criminalisation/punishment is a core component of the human rights based approach to counter-trafficking that is an approach that places the trafficked person at the centre of all counter-trafficking

⁴¹ See Annison (n 37) 93

⁴² Gallagher, *The International Law of Human Trafficking* (n 4) 283

instruments and seeks to respect his/her human rights as set out in the various international and regional instruments. It is introduced in some detail here. The principle is enshrined in hard and soft law instruments of both universal and regional reach. Article 26 of the Council of Europe Convention explicitly provides that:

Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities to the extent that they have been compelled to do so.

This is a weak provision, merely requiring the ‘possibility’ of non-imposition of penalties. It falls short of requiring non-criminalisation and non-prosecution. This provision is further elaborated by the Explanatory Report that notes how this provision can be complied with through the provision of substantive criminal or procedural law provisions, or any other measure allowing for the possibility of not punishing the trafficked person when relevant legal requirements are met.⁴³ The Council of Europe Group of Experts on Action against Trafficking in Human Beings has further interpreted the provision as establishing a positive obligation on States Party to the Convention to adopt measures that specifically deal with the non-liability of trafficked persons arguing that their criminalisation contravenes obligations to provide assistance and support, and negatively impacts on investigations and prosecutions of traffickers by discouraging trafficked persons from co-operating with the criminal justice processes.⁴⁴

⁴³ Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings* (Council of Europe 2005) para 274

⁴⁴ Council of Europe, Committee of the Parties Council of Europe Convention on Action against Trafficking in Human Beings, Meeting Report of the 7th meeting of the Committee of the Parties (Strasbourg, 30 January 2011), THB-CP(2012)RAP7 (Strasbourg, 9 February 2012), Appendix II, Para. 7

The 2011 Trafficking Directive develops this provision further by requiring the non-prosecution of trafficked persons rather than merely the non-imposition of punishment. This clearly shifts the legal obligation onto the prosecution services,⁴⁵ ensuring that trafficked persons are not only not punished but also to not have to endure the process of being charged with a crime. Article 8 of the Directive provides that:

Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts [i.e., offences concerning trafficking in human beings] referred to in Article 2.

The aim, as highlighted by the Preamble to the Directive is threefold: to safeguard the human rights of trafficked persons, to avoid further victimisation and to encourage trafficked persons to participate in the criminal justice processes as witnesses against their perpetrators.

Hard law provisions on non-punishment are limited to the European context. The Protocol, which remains the only hard law instrument of universal reach is silent in this regard. A number of soft law instruments however also address the issue. The OHCHR Principles and Guidelines⁴⁶ require that trafficked persons not be detained, charged or prosecuted. Recommendation 7 provides that:

Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and

⁴⁵ This is an important consideration. In the recent case of [2013] EWCA Crim 991 the UK court has held that: 'Despite suggestions in the submissions to the contrary, the court cannot become involved either in the investigation of the case or the prosecutorial decision whether it is in the public interest for the prosecution to proceed'

⁴⁶ OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (United Nations 2010)

destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.

These policies have also been supported by the General Assembly of the United Nations,⁴⁷ the United Nations Working Group on Trafficking in Persons⁴⁸ and the UN Special Rapporteur on Trafficking in Persons.⁴⁹ Regional bodies have also promoted such measures, including the OSCE,⁵⁰ the Commonwealth of Independent States, and the European Commission's Expert Group on Human Trafficking.

The reference to 'a direct consequence' aims to control for the risk of providing blanket immunity to trafficked persons for all crimes and offences committed, and reflects that this principle of non-criminalisation is an exception to the general rule of criminal responsibility relating to the general criminal law defence of duress or compulsion. In part this addresses the reluctance of States to offer (or appear to offer) blanket immunity for crimes committed. National guidance has also been adopted in this regard. In the UK, for instance the Crown Prosecution Service has issued guidance to prosecutors advising them that when, in the course of reviewing a case there are indications that the suspect might be a trafficked person, they

⁴⁷ United Nations, Resolution on Trafficking in Women and Girls, / adopted by the General Assembly, A/RES/55/67 (31 January 2001), para. 6; also United Nations, Resolution Global Plan of Action to Combat Trafficking in Persons: adopted by the General Assembly, A/RES/64/293 (12 August 2010): it requires States to 'Ensure that victims of trafficking in persons are treated as victims of crime and that national legislation effectively criminalizes all forms of trafficking' and urges "Governments to take all appropriate measures to ensure that identified victims of trafficking in persons are not penalised for having been trafficked and that they do not suffer from victimization as a result of actions taken by Government authorities'

⁴⁸ United Nations, Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009, CTOC/COP/WG.4/2009/2 (21 April 2009) para. 12: provides that "States Parties should [...] consider, in line with their domestic legislation, not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons, or where they were compelled to commit such unlawful acts'

⁴⁹ See: UN Human Rights Council, Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy Ngozi Ezeilo, A/HRC/20/18 (6 June 2012), paras. 23-30.y

⁵⁰ See for instance: OSCE Permanent Council, Decision No. 557/Rev.1 OSCE Action Plan to Combat Trafficking in Human Beings, PC.Dec/557/Rev.1 (Vienna, 7 July 2005), Chapter IV, para. 5.2 and OSCE Ministerial Council, Decision No. 1 Enhancing the OSCE's Efforts to Combat Trafficking in Human Beings, MC(8).DEC/1 (Vienna, 28 November 2000) para. 9

should be pro-active in causing enquiries to be made and to gather further information on the circumstances in which the suspect was apprehended. Such pro-active measures are a duty of the prosecutor as determined by the United Kingdom Court of Appeal in *R v. O*.⁵¹

The guidance also clarifies that even where the circumstances do not meet the requirements for the criminal law defence of duress,⁵² prosecutors ought to consider whether prosecution is in the public interest. There is, however, a great deal of discretion exercised by the prosecutors in this regard and research from the UK indicates that the more serious the offence, the more likely it is that a prosecutor will consider it in the public interest to pursue a prosecution reflecting a hierarchy of discontinuance.⁵³ The drug related cases once again highlight an interesting intersection between legal instruments and policy objectives. The drugs instruments on the one hand, focus on criminalisation and punishment, whilst trafficking instruments aim to provide some level of protection to trafficked persons involved in such crimes. On the national level CPS Guidance on trafficked persons are contrasted with sentencing guidelines for drug offences that require mandatory prison sentences for cannabis cultivation.

Non-Criminalisation has a number of core implications and benefits. First, it acknowledges that the trafficked person is a victim rather than a perpetrator of a crime. As such, he/she should be protected not prosecuted. Second, it reflects an

⁵¹ *R v. O*, [2008] EWCA Crim 2835, United Kingdom: Court of Appeal (England and Wales), 2 September 2008

⁵² There are a number of requirements in this regard: specific threat to kill or grievously injure the defendant or a third party, reasonable belief that the threat is genuine, threat is present, imminent and impending at the time of the criminal act, no reasonable escape from the threat except through compliance and that the defendant was not at fault in exposing himself to the threat. This definition is therefore subject to restrictive interpretations that might not help trafficked persons.

⁵³

acknowledgment that the criminal actions were not accompanied by the requisite *mens rea* required for criminal conviction in line with the general criminal law provisions around compulsion to commit a crime. Third, individuals who are protected from criminalisation are more likely to be the lower ranking members of organised crime groups and therefore protecting them might secure their assistance in investigations and prosecution of individuals higher up in the criminal processes.

6.3.2 Relevance to Exclusion and Revocation Provisions

The relevance of the non-criminalisation provisions within the context of trafficking based asylum claims refers back to the exclusion and revocation clauses specifically those relating to applicants' who have been convicted of crime. The provisions may apply in one of three ways.

First, by preventing the actual criminalisation and subsequent conviction, the relevant exclusion and revocation clauses would not come into play. The relevant provisions (reproduced above) refer to final judgments allowing the opportunity for criminal convictions to be overturned. A number of recent cases emanating from high courts in the UK highlight the relevance of this. In these cases, individuals had been convicted of cannabis cultivation in situations where the trafficking scenario (read: defence) was not raised. Identified at a later stage, the decisions were appealed with the aim of quashing that original conviction and in some of the cases this was successful. If conviction is over-turned there is no basis for the application of the exclusion or revocation clauses.

Second, even where the non-criminalisation was not raised during the criminal trial, the asylum adjudicators can take it into consideration for the purposes of

determining the application of the cessation/revocation clauses. Immigration tribunals are often better equipped to identify cases of trafficking than criminal courts due to their specialist expertise. The discretionary wording of the revocation provision under the Qualification Directive further strengthens this judicial opportunity. Under the Qualification Directive, Member States retain the discretion as to whether to revoke refugee status for individuals who have been convicted of serious offences.⁵⁴ Status determination authorities do not therefore necessarily have to revoke protection even if the criminal process has found an individual guilty and sentenced him/her as such.

Moreover, it is argued here that as a result of the effectively punitive nature of the exclusion and revocation clauses, the non-criminalisation and/or non-punishment provisions should be applied to the determination procedure irrespective of whether they had been raised earlier in the process. Commentators⁵⁵ have argued that exclusion is not a punitive measure but rather one aimed at safeguarding the interests, safety and security of the State of asylum. This provides further scope to reconcile the interests of the State of asylum with those of the trafficked persons believed to have committed a serious, non-political crime. The non-application of the exclusion and revocation clauses is mandated by the obligation to apply treaty provisions in good faith, including both the trafficking and the refugee law instruments. The latter must be interpreted in the light of its humanitarian objectives.

The criminalisation of trafficked persons increases their risks of re-trafficking whether within the country of destination or upon return not least because of the

⁵⁴ Article 14

⁵⁵ See: Hathaway and Harvey (n 3)

heightened visibility of such cases and the risks such prosecution may bring to the traffickers themselves. Such criminalisation can therefore further strengthen the applicant's well-founded fear of persecution upon return.

Part 4: The Need for Case-by-Case determinations

Whilst this chapter has attempted a principled argument to the application of the exclusion and revocation clauses to trafficked persons based on the distinction between trafficker and trafficked persons (perpetrator and victim), the reality of human trafficking is not always so clear-cut. One such scenario relates to individuals who have been trafficked but are now collaborating with their trafficker in recruiting further persons, or who manages parts of the trafficking operation on the traffickers' behalf.⁵⁶ There is now some literature on this phenomenon that provides a number of explanations. These range on a spectrum from innocent recruitment by persons unknowing of the intention of their traffickers, to individuals being forced to recruit others either by violence or by promise that if someone else is recruited they will be freed, to individuals who act this way as a result of the Stockholm syndrome in the belief that their trafficker/s will treat them better if they comply with his/their wishes. Forcing trafficked persons to commit crimes, especially recruiting others to the same networks, also helps establish control over the individual, creating a further threat that can be exploited by the traffickers with regard to their victims. Such situations require careful consideration in assessing the complex psychology of trafficking and issues around the Stockholm syndrome and similar conditions. The following spectrum of situations highlights the complexity of determining one's

⁵⁶ On this issue see Sidharth Kara, *Sex Trafficking: Inside the Business of Modern Slavery* (Columbia University Press 2009) 9

status and reflects the need for a case-by-case determination. Let us imagine that “A” has been trafficked. A lover boy convinced her to travel to London with promises of love and a waitressing job. Upon arrival in London she was forced into prostitution.

- I. “A” was further threatened by her traffickers and forced to travel to her home country to recruit new girls into their enterprise. Whilst there, she was under their supervision. She convinced others to enter the trafficking rings promising them opportunities abroad.
- II. “A” contracted an STD and was no longer able to work. Her traffickers got angry and said that she now had to find a replacement for herself in order to make sure that the income she owes them will get paid. Scared for her safety, she did what was required of her.
- III. “A” was threatened by her traffickers that unless she finds a replacement for herself, they would traffic her daughter and/or sister to replace her in the brothel. Afraid for their safety, and aware that her trafficker knew of their whereabouts, she complied.
- IV. “A” was promised freedom by her traffickers on the condition that she finds a replacement for herself. Feeling like this was her only opportunity to leave the brothel alive, she did as instructed.
- V. “A” was required to traffic drugs to clients during her work at the brothel. She did not question the request and complied without objection.
- VI. “A” worked within the brothel for a number of years and was pleasing to her traffickers. She managed to work her way up in the organisation’s management structure and is now responsible for managing a number of

other girls. She often exerts violence on them. She is now free to leave at any time.

- VII. "A" has managed to pay her way out of trafficking. Having noticed how profitable the process can be she has opted to recruit more people and run her own brothel, in the same way that the brothel she worked in was run.

It is up to the status determination authorities to determine, on a case by case basis whether the applicant is a trafficker or a trafficked person, and as such whether he/she should be protected under the non-criminalisation clauses or excluded under the exclusion clauses for his/her acts. It is critical however that a claimant does not get excluded from protection on the basis of offences committed whilst he/she was under the influence of the trafficker. At face value, it can be said that situation I to V the claimant should be protected from exclusion, whilst this is not the case in the last two situations. A number of issues must, however, be considered, including mental health issues around Stockholm syndrome and other survival tactics. The real extent of trafficking and its implications on the physical and psychological well-being of the applicant must also be duly considered, including through the support of professionals in the field. By their very nature, exclusion and revocation clauses ought to be strictly interpreted and asylum seekers should enjoy the benefit of the doubt. Status determination authorities have a serious responsibility on their hands, one that they ought to exercise with great care and with utmost responsibility.

The line to be crossed would need to be determined on a case by case basis. However, it is argued here that wherever the influence of the trafficker is a clear predictor of the individual's involvement in the crime, the trafficked person seeking

asylum should be treated as a 'victim' rather than as a perpetrator and should therefore not be excluded from protection.⁵⁷

Part 5: Concluding Remarks

Human trafficking is now considered a serious crime, one that cuts to the root of human dignity and which carries with it international condemnation. Provided specific characteristics are met, it may be considered a crime against humanity or a serious non-political crime carrying the potential exclusion of the individual applicant from international protection. On the other hand the non-punishment provisions in the various counter-trafficking instruments ought to protect trafficked persons from exclusion relating to crimes committed whilst under the control of their trafficker. The distinction is not always clear cut highlighting the importance of adequate, trained and well equipped status determination authorities that (or) who would be able to identify trafficking and deal with its various facets (legal, human, psychological) accordingly.

Once again, this chapter highlights the relevance of intersections in the determination of trafficking based asylum claims. Throughout this analysis we have identified the relevance of international and transnational criminal law, statutes and judgments of international criminal courts and tribunals as well as national criminal laws including prosecutorial guidelines. This chapter has convincingly argued, it is hoped, that traffickers can be excluded from protection whilst trafficked persons ought to be protected, in line with the rights based approach to anti-trafficking.

⁵⁷ See on this: Rebecca Surtees, 'Traffickers and Trafficking in Southern and Eastern Europe Considering the Other Side of Human Trafficking' (2008) 5 *European Journal of Criminology* 39

Chapter 7: Procedural Issues

Chapter 2 identified the importance of asylum as a channel for the long-term protection of trafficked persons. The substance of such claims has been elaborated in the intermittent chapters. We now address some of the procedural issues that arise in the context of trafficking based asylum claims. The core claim here that the protection potential of asylum will only be meaningful if trafficked persons have effective access to the asylum procedures, if the procedures are carried out in a fair and transparent manner which adequately caters for the individual's vulnerability, if procedural safeguards are put in place and if critical attention is paid to all relevant sources of information. These issues will also significantly impact on the way trafficked persons experience the asylum process and in their search for protection.

This chapter is organised as follows. Part 1 deals with trafficked persons' access to the asylum system, including issues of information, referral and competence. The relevance of the Dublin system to trafficked persons is also addressed here. Part 2 deals with trafficked persons within the actual asylum processes, outlining issues such as status determination and the treatment of vulnerabilities, including psychological and procedural vulnerabilities. Part 3 deals with evidentiary issues focusing on the relevance of the United States Trafficking in Persons Report to determining trafficking based claims. Part 4 raises a number miscellaneous procedural issues. Part 5 concludes the analysis.

It ought to be pointed out that a strong UK focus emerges in this chapter. This is due to the fact that for practical reasons conversations with stakeholders and case shadowing both happened in the UK, and not in other jurisdictions to which reference is made throughout the thesis. Many, if not all, of the issues discussed will, however, also arise, to varying degrees, and with some jurisdiction specific modifications, in other jurisdictions as the literature amply illustrates.

Part 1 - Access to the Asylum Process

7.1.1 Information and Referral

Trafficked persons face a number of obstacles in accessing international protection, including in accessing the asylum process. Barriers in this regard persist notwithstanding saving clauses in the anti-trafficking instruments including: Article 14 of the Trafficking Protocol, Article 40 of the CoE Convention and the Preamble to the 2011 Anti-Trafficking Directive which provide that anti-trafficking efforts should be without prejudice to the right to international protection under international (and European) refugee law. The explanatory report to the CoE Convention notes that States Parties 'shall ensure that victims of trafficking have access to appropriate and fair asylum procedures',¹ whilst the UNHCR has called upon States to ensure that their asylum systems are open to claims by trafficked persons and persons at risk of trafficking.²

¹ Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings* (Council of Europe 2005) para 377

² See *inter alia*: UN High Commissioner for Refugees, *Agenda for Protection*, Third edition (UNHCR 2003) Goal 2 Objective 2

One critical barrier is information. Trafficked persons need to be informed of their right to seek international protection in an accessible language and format. The 2011 Trafficking Directive makes this a legal obligation. In Article 11 it provides, *inter alia*, for a duty to inform trafficked persons of the possibility of seeking international protection under the Qualification Directive. Moreover, the preamble to the Procedures Directive³ provides that applicants should be provided ‘free of charge, with legal and procedural information, taking into account their particular circumstances’.⁴ Whilst not explicitly targeted at trafficked persons this is important considering the specific circumstances of trafficked persons, including experiences of trauma and PTSD.

Whilst these obligations rest on Member States, it is also the case that such information can be transmitted through a variety of means and through stakeholders, including official bodies as well as NGOs and other charities working with trafficked persons. The asylum option ought to be presented as one of the avenues available to the individual in deciding on the way forward, highlighting asylum’s role of protecting from persecution upon return to one’s country of origin. Promising practices exist. In Norway, for instance, trafficked persons receive legal advice for around 5 hours which includes information about seeking asylum.⁵ In Ireland, an obligation to inform of the right to seek asylum applies but only insofar as the individual is identified at the

³ The Procedures Directive is part of the Common European Asylum System and establishes minimum procedural standards for status determination processes across the European Union. See: Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), Official Journal L 180/60, 29 June 2013

⁴ Preamble para 22

⁵ Jacqueline Bhabha and Christina Alfriev, ‘The Identification and Referral of Trafficked Persons to Procedures for Determining International Protection Needs’ (Legal and Protection Policy Research Series 2009) para 24

border.⁶

Closely related to this is the issue of referral between trafficked persons protection systems and international protection systems. Bhabha and Alfirev found that in most countries the two systems are, at best, separate mechanisms with no systemic linkages, despite often catering for overlapping populations.⁷ They categorise national systems into three groups in this regard.

The first includes States that have both a trafficking system and a system for international protection but the referral system between the two is weak. The second involves States with an established asylum system but no trafficking specific system. The third covers States with a system for protecting trafficked persons but no system of international protection.⁸

Their research found that whilst some countries like Ireland, Italy, Serbia, Nigeria and Kyrgyzstan have in place both a trafficking protection and international protection system, there was no effective referral system between the two processes resulting in a situation where ‘despite the laudable enactment of a comprehensive legal framework, trafficked persons in practice have difficulty accessing the asylum system’.⁹ Ad hoc referrals exist in some countries whilst in others it is up to, and at the discretion of, lawyers and advisers to inform the client about these options. In practice, referral has tended to be unpredictable, ad hoc and unsystematic which, whilst being better than a general lack of referral, falls short of ensuring the realisation of international protection obligations.¹⁰ Development of such referral

⁶ Ibid para 47

⁷ Ibid para 42

⁸ Ibid para 43

⁹ Ibid para 44

¹⁰ Ibid para 48

systems would include the enactment of standard operating procedures, information and instructions to relevant staff and the monitoring of claims. Lacking such systems, lawyers and other service providers play a critical role in ensuring that trafficked persons are informed of their right to, seek international protection and to initiate a process towards seeking such international protection. As Foster rightly argues, and as this research clearly identifies, the failure to refer trafficked persons to status determination procedures may give rise to violations of the principle of *non-refoulement*.¹¹

These challenges can be read within a framework of conceptual obstacles to predictable referral between the two systems. These include: the distinction between the law enforcement focus on anti-trafficking efforts and the protection focus of asylum, the (perceived) diverging objectives, the continued treatment of trafficked persons as ‘illegal’ immigrants and the general difficulty to build public consensus on efforts to protect migrants and allocate resources for their protection.¹²

7.1.2 A European Issue: The Dublin System and Trafficked Persons

Within the European context another issue may come in the way of allowing access to asylum procedures, and that is if the State is deemed not responsible for a specific claim under the so-called Dublin system. A core component of the Common European Asylum System (CEAS) is the (notorious) Dublin II Regulation establishing the Member State responsible for a particular asylum seeker and his/her application for

¹¹ Anne Dorevitch and Michelle Foster, ‘Obstacles on the Road to Protection: Assessing the Treatment of Sex-trafficking Victims under Australia's Migration and Refugee Law’ (2008) 9 Melbourne Journal of International Law 1 15

¹² See: Bhabha and Alfriev (n 5) para 80-84

international protection.¹³ The Recast Regulation was adopted in June 2013 and will come into force by the end of 2013 (Dublin III).

The Regulation seeks to avoid forum shopping in establishing that an asylum application 'shall be examined by a single Member State'.¹⁴ The selection is linked to a hierarchy of criteria including: family unity, possession of a valid residence permit/visa, irregular entry or stay, entry on a visa waiver and application in an international transit zone. In the case that the asylum applicant is a minor, the best interest of the child should be a primary consideration. In practice the Regulation places an unduly large responsibility on border States, the main criterion applied being the irregular entry option, and as such the vulnerabilities of asylum applicants are subsequently not adequately addressed. The result has included families being split up, the detention of individuals and inadequate reception conditions. The regulation is criticised, not least by various border countries, for the unfair burden it places on them, as well as by refugee assisting organisations, as contradicting some of the protection objectives of the CEAS.

Human trafficking is explicitly mentioned in the regulation as a safety and security consideration to be considered when determining the best interest of child asylum seekers, but is not considered a factor with regard to adults. Similarly, vulnerability is also not considered even though the European Court, in examining cases relating to the Dublin system, did address issues of vulnerability in determining the suitability of return to the country of first entry. The Recast Regulation develops specific measures, including the idea of an early warning mechanism whereby Member States are

¹³ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national; *Official Journal L 050, 25/02/2003 P.0001 - 0010*

¹⁴ Article 3(1)

obliged to report on the situation of asylum in their country in order to avoid an asylum crisis in any country. A critique of this is that the reporting does not include measures listed in the *MSS v. Belgium and Greece* Judgment¹⁵ on the treatment of asylum seekers, and specifically on whether the system is capable of dealing with vulnerable applicants.

In the context of human trafficking, the Dublin system raises various important concerns, including where, for instance, an individual faces return to the country in which he or she has experienced exploitation and abuse. In the United Kingdom a number of organisations came together to protest the application of the Regulation to trafficked persons. They noted that applying the Regulation violated Articles 12 and 16 of the Council of Europe Trafficking Convention. Moreover, as has been noted above, trafficking may in some cases amount to inhuman and degrading treatment. Dublin III (the recast Regulation) includes, in Article 3(2) a built in mechanism inspired by the ECHR's findings in *MSS v. Belgium and Greece*,¹⁶ to prevent return to countries where an asylum seeker faces risk of such inhuman or degrading treatment. This amendment, which does not create any new legal rules (the prohibition of *refoulement* is applicable to all EU Member States as they are all parties to the ECHR), reflects a shift from the premise that all EU member States respect fundamental rights, and that it is therefore safe to automatically transfer asylum seekers between EU countries.¹⁷

¹⁵ *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, available at: <http://www.refworld.org/docid/4d39bc7f2.html> [last accessed: 5 October 2013]

¹⁶ *Ibid*

¹⁷ European Council on Refugees and Exiles (ECRE), *The European Court of Human Rights condemns Belgium and Greece: A Major Blow to the Dublin System: Returning Asylum Seekers to Greece Violates the European Convention on Human Rights*, Brussels, 21 January 2011, available at: http://www.ecre.org/files/2011_01_21%20ECHR%20MSS%20case%20_ECRE_final-1-1.pdf [last

This is far more than an academic consideration. Data from the Poppy Project in the UK has found that of the clients who were in the asylum process and who were eligible for removal to another EU Member State under the Regulation, 11% were eligible for return to Greece.¹⁸ Fear of being returned to such other EU Member States will also deter trafficked persons from coming forward for identification and from seeking protection. The Regulation does include a safety valve in this regard in the form of the so-called sovereignty clause that allows States to examine an application for asylum lodged with it by a Third Country National even if such an examination is not its responsibility under the regulation criteria. The Regulation also includes a humanitarian clause, however this is restricted solely to situations of maintaining family unity.

Beyond these issues, a number of more operational and practical concerns also arise. Research in Spain, for instance, has outlined how information sharing is problematic in these cases, and often there are situations where people are returned and the receiving State is unclear of the processes underway and any specific requirements.¹⁹ Information about the specific needs of the returnee is channelled through so many people and departments that it often inadvertently gets lost in the bureaucracy. This is problematic generally, but all the more so when the individual being returned has specific protection and assistance needs for which the receiving State may not be prepared. Risks of similar issues arising are heightened by the 'implied acceptance'

accessed: 5 October 2013]. See more generally: Patricia Mallia, 'Case of MSS v. Belgium and Greece: A Catalyst in the Re-thinking of the Dublin II Regulation' (2011) 30 Refugee Survey Quarterly 107; Patricia Mallia, 'Introductory note to the European Court of Human Rights: MSS v Belgium & Greece' (2011) 50 International Legal Materials 364

¹⁸ AIRE Centre and others, 'Call for Exception From Dublin II Procedures for Victims of Trafficking' (ATLEP UK, 2008)

¹⁹ Defensor del Pueblo, *Human Trafficking in Spain: Invisible Victims* (Defensor del Pueblo 2012)

system whereby a State that does not reply to a request within a stipulated timeframe is deemed to have accepted responsibility for that particular claim.²⁰

Article 3(2) of the current Dublin Regulation (Article 17 of Recast Regulation) allows Member States to take responsibility for a claim even if another State could be responsible under the Regulation.²¹ This is an important provision that could provide a legal basis for States to avoid returning trafficked persons to other European countries where the applicant may have experienced trafficking, exploitation or other forms of abuse. The provision is, however, discretionary and therefore it is up to the particular State to make the decision. Member State approaches on this issue vary considerably as highlighted by data collected by the European Migration Network.²² Belgium applies the sovereignty clause exception to all trafficked persons; Ireland, Norway, Sweden and the Netherlands apply it to people who are identified as having been trafficked in the country and/or who are helping the local authorities with investigations; Spain and Finland consider such status as part of a case by case determination but do not provide specific exceptions. France does not apply the exception at all. The UK applies the Dublin Regulation to trafficked persons but only where it is satisfied that it is safe to return the individual to that country and that this is not in violation of its international obligations. The situation has not yet been encountered in Slovakia, Luxembourg, Lithuania and Latvia.

²⁰ Article 22(7) provides that: Failure to act within the two-month period mentioned in paragraph 1 and the one-month period mentioned in paragraph 6 shall be tantamount to accepting the request, and entail the obligation to take charge of the person, including the obligation to provide for proper arrangements for arrival.

²¹ Article 17(1) provides that: 'by way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this regulation.'

²² EMN, *Ad-Hoc Query on Trafficking in Human Beings* (EMN 2013)

These issues were prominent in the UK case of *E. v. the Secretary of State for the Home Department*. This case revolved around a young Eritrean woman who, having been orphaned at a young age, worked as a child prostitute in Eritrea. She was later trafficked to Sweden where she was kept in slave-like conditions. After years of abuse there she escaped to Norway and later to the United Kingdom filing asylum claims in both of these countries. The United Kingdom rejected her claim on third country grounds meaning that the claim could not be positively determined in the UK because Norway was the State responsible for the claim and had accepted this responsibility. The court determined that the claimant had not been trafficked to the UK and therefore the United Kingdom did not have protection obligations under the Trafficking Convention towards her.

7.1.3 Parallel Systems: Friend or Foe?

Having surpassed the primary hurdle of referral, a next procedural challenge arises, namely one's concurrent participation within two systems running in parallel and with frequent overlaps. Different countries have taken different approaches on this point and the examples of Ireland and the United Kingdom are used here to illustrate some possible challenges. The Immigrant Council of Ireland²³ reports how asylum seekers (including trafficked persons within the asylum system) are excluded from the reflection period and residence permit system associated with collaboration with the relevant authorities in the context of trafficking. The premise is that there is no need for such measures since being an asylum seeker entails a right to remain.²⁴

²³ Immigrant Council of Ireland, *Asylum Seeking Victims of Human Trafficking in Ireland: Legal and Practical Challenges* (Immigrant Council of Ireland 2011)

²⁴ Ibid

The detachment of the two systems, however, also prejudices trafficked persons in others ways including with regard to access to employment, accommodation and compensation. Access to the labour market is delayed in the context of asylum²⁵ but not in the context of trafficked persons. Indeed, barring trafficked persons access to the labour market breaches Article 12 of the CoE Trafficking Convention.²⁶ The ICI also raises a number of serious concerns regarding the accommodation offered to asylum seekers with regard to trafficked persons arguing that ‘this accommodation is inappropriate for victims of trafficking as they have already experienced highly traumatising human rights violations, including sexual exploitation’²⁷ and breaches the requirements of the CoE Trafficking Convention and of the Trafficking Protocol.²⁸ Furthermore, the exclusion from the possibility of recognition as a trafficked person may prejudice the right to compensation provided for under the various trafficking instruments. Such practices breach the non-discrimination clauses in Article 3 of the CoE Trafficking Convention. In Ireland therefore, despite cooperating with the criminal justice process, those individuals who have sought asylum are denied the benefits of formal identification as trafficked persons.

In the UK, an individual can go through the two processes concurrently however the overlaps between the systems (including that the national referral mechanism and asylum decisions are made by the same Home Office official) has raised a series of concerns, leading lawyers to advise clients not to file a National Referral Mechanism

²⁵ Under the European Union Reception Conditions Directive, Member States are only obliged to grant access to the labour market after 9 months from when the application for asylum is filed

²⁶ Article 12(4) provides that: Each Party shall adopt the rules under which victims lawfully resident within its territory shall be authorised to have access to the labour market, to vocational training and to education

²⁷ Immigrant Council of Ireland (n 23) 7

²⁸ For a list of grievances about the accommodation see: *ibid* 7

(hereinafter NRM) application.²⁹ Informants in the present research highlighted how negative NRM determinations by United Kingdom Border Agency (hereinafter UKBA) officers negatively impacts on the likelihood of a successful case elsewhere and therefore some legal representatives have advised their clients to avoid entering the NRM system, simply to avoid the possible negative repercussions that a negative NRM decision might have towards one's credibility if trafficking is claimed during the asylum process. Focusing on the situation of women specifically, Steipnitz notes that an environment marked by a culture of disbelief or culture of refusal, as duly illustrated by Asylum Aid, the Refugee Council, the Independent Asylum Commission and an internal audit of the UKBA itself, 'presents particular challenges and concerns for a system designed to identify victims of trafficking, especially those who also claim asylum'.³⁰ Steipnitz is weary of the overlaps between the two processes and the potential risks that such convergence (or overlap) can have on trafficked persons and their identification as 'victims'. Beyond status determination in terms of accommodation, UKBA Guidelines on trafficked persons seeking asylum clearly establish that where an asylum seeker is formally identified as a trafficked person, the UKBA is obliged to ensure that the accommodation provided is appropriate and secure.³¹

²⁹ A National Referral Mechanism is a process for determining whether an individual is a trafficked person entitled to a reflection period and a residence permit based on his status as a trafficked person. It can be briefly described as a victim status determination process. For more information on NRM's see: Organisation for Security and Co-operation in Europe, *National Referral Mechanism - Joining Efforts to Protect the Rights of Trafficked Persons. A Practical Handbook*, (OSCE 2004)

³⁰ Abigail Steipnitz 'A Lie More Disastrous Than the Truth: Asylum and the Identification of Trafficked Women in the UK.' (2012) 1 Anti-Trafficking Review 104

³¹ UK Border Agency, 'Guidance for Competent Authorities - Trafficking in Human Beings' Asylum Process Guidance (UKBA 2012) 16

Part 2: Trafficked Persons in the Asylum Processes

Having outlined some of the challenges trafficked persons face in accessing asylum determination processes we now turn to some of the difficulties encountered within the process of seeking international protection. These challenges must be understood within a context of the practical barriers discussed above, personal and contextual vulnerability, isolation and disempowerment. Moreover, it is important to acknowledge that some of the issues discussed here are not limited to trafficked persons in the asylum process. Whilst this chapter will not delve into a detailed elaboration of the literature in the area of asylum adjudication, a number of overlaps can be identified.³²

7.2.1 Trafficked Person / Victim's Status

A key issue in trafficking based claims is the identification by the refugee status determination³³ authorities that the applicant is a trafficked person. Especially in situations where the applicant has not been through an NRM/certification process³⁴ as a trafficked person, responsibility vests in the refugee status determination authorities to determine whether the applicant is, in fact, a trafficked person. This issue will arise both when trafficking is explicitly raised as well as in situations where, whilst not having been raised, the trafficking context provides a relevant background to the experiences and risks of the applicant. Status determination officials at all levels should therefore be well trained in the identification of trafficked persons, and

³² See in this regard: Robert Thomas, Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom, (2008) 20 International Journal of Refugee Law 4 489-532

³³ As distinguished from the national referral mechanism, or equivalent process, which is specifically in charge of identifying victim status within the trafficking framework.

³⁴ This is discussed in further detail below.

lawyers should assist courts in this endeavour. Access to and training on indicators of trafficking should be standard practice for asylum determination officials at all levels.

Moreover, the perception by the 'system' of an applicant as a smuggled migrant rather than a trafficked person will create barriers to credibility and negatively impact on the likelihood of a positive outcome. This risk is further heightened if the individual does not fit the 'Natasha' image of vulnerability i.e. he/she does not present him/herself in the way a trafficked person is expected to. This is also related to formal identification, i.e. does the applicant need to be formally identified as a trafficked person for a trafficking based asylum claim to succeed in a trafficking based asylum claim. The answer to this question should be in the negative.

Closely associated with this is the issue of self-identification as a trafficked person (read victim). This is a critical factor in determining the grounds upon which protection is sought and whether past experiences of trafficking as well as trafficking associated risks are factors / grounds actively pursued when seeking protection. From the perspective of legal representation, this is also linked to the issue of instruction,³⁵ and raises a number of questions of a professional ethical nature, including whether trafficking related risks can be raised on behalf of someone who does not see himself as a trafficked person and how then does one work around the instruction requirements. The following is a scenario where this might arise. A young person is convicted of drug trafficking charges. Human trafficking was not raised as a defence in his criminal proceedings. He is referred to a lawyer to challenge an automatic deportation order issued as a result of having been convicted of a serious crime. The lawyer identifies indicators of human trafficking and makes this a key argument. The

³⁵ 'Instructions' means instructions or directions in whatever form (including a brief) given to a practising barrister to supply legal services whether in a contentious or in a non contentious matter.

client might be too scared to admit wrongdoing on the part of his traffickers, or might simply not understand the legal protections available to him upon recognition as a trafficked person. The lawyer, on the other hand, firmly believes that the client would have a strong claim based on his former trafficking experience.

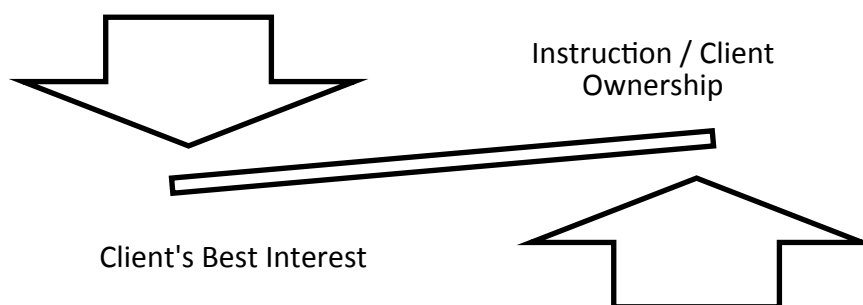


Figure 11: Client's Best Interest v. Client Instruction

This has to be balanced against the right not to be considered a victim if one does not consider oneself as such. As such it causes an ethical dilemma between the instruction of the client and his/her best interest. This is an issue that must be addressed at various stages, and in various guises, and as such is one that warrants further guidance by the relevant professional bodies. On the one hand there is the lawyer's duty, as set out in the code of conduct, to 'promote and protect fearlessly and by all proper and lawful means the lay client's best interests (...)'.³⁶ On the other hand, there is a risk of trying to pigeon-hole clients under a cloak of victimhood which they might rather avoid and for which the lawyer might not have adequate client instruction. For instance, a client might not wish to acknowledge past experiences of sexual violence and exploitation because of a risk of ostracism upon return.

³⁶ Article 303(A) of *Code of Conduct of the Bar of England & Wales - 8th Edition* (Bar Standards Board 2012)

There is therefore here the relevance of the role of the lawyer as educator, allowing the lawyer to educate, support and assist his client in determining whether recognition as a trafficked person is in his/her best interest.³⁷ This would help ensure the provision of best possible service, and the acquisition of the best possible opportunities for the applicant. This should be the ultimate goal of the lawyer.

7.2.2 Vulnerability, Trauma and the Asylum Process

The issue of vulnerability has featured extensively throughout this research. We have looked primarily at vulnerability to trafficking within the context of well-founded fear and abuse of vulnerability as a means of trafficking. We now focus on how vulnerability impacts on the procedural dimension of seeking protection. The European Court of Human Rights determined in *MSS v. Belgium and Greece* that all asylum seekers are inherently vulnerable. Trafficked persons, by virtue of their experiences of exploitation and background are also deemed vulnerable. Such vulnerabilities include: physical, psychological, legal, political and procedural vulnerabilities. The issue of trauma as psychological vulnerability with strong procedural implications is of particular relevance to this research and will be the focus here.

Trauma associated with past trafficking is likely to negatively impact on the way trafficked persons experience the asylum process. The term ‘traumatised trafficked persons’ describes persons who are overwhelmed by the trafficking experience and are as a result unable to coherently and/or accurately recount that persecution, or related events, with or without accompanying physiological, psychological or

³⁷ For more on this see: Maria Pisani, ‘The Asylum Process and Possibilities for Transformative Pedagogy: Exploring the Case of Sub-Saharan African Female Asylum Seekers in Malta’ (Forthcoming) *Journal of Island Studies*

psychiatric symptoms.³⁸ This, in turn, has considerable ramifications on the assessment of the individual's credibility, which as noted briefly elsewhere in this thesis is a critical requirement in the finding of one's well-founded fear of persecution.

Trauma results from various aspects of the trafficking experience: a sense of loss of one's ownership over himself and his body, feelings of co-responsibility in one's own experience, being blackmailed about family members, a fear that others will discover one's plight, as well as the constant requirement of exploitation especially in the context where this involves the non-consensual use of one's own body. As a result, the trafficked person might be overwhelmed by negative feelings, including humiliation, lack of self worth and powerlessness. Psychological trauma affects people in very complex ways. The desire to forget, or to place the past experience behind them, may result in their capacity to remember being altered/impaired as part of a mechanism for the defence of the integrity of the self.³⁹

To the unsympathetic ear, this might reflect lack of credibility and thereby a basis for rejecting an asylum claim.⁴⁰ Put differently, trauma will often impact on the applicant's ability to present his/her asylum application and to formulate their well-

³⁸ Definition adapted from: Kalvir Kaur, 'Obtaining Evidence from Traumatized Trafficked Persons' in Parosha Chandran (ed), *Human Trafficking Handbook: Recognising Trafficking and Modern-Day Slavery in the UK* (LexisNexis 2011)

³⁹ Based on conversation with research participant who has extensive experience working with traumatised asylum seekers in a capacity as psychologist for an international humanitarian organisation.

⁴⁰ Credibility assessments play a critical role in status determination, but represent a very complex and challenging area of refugee law and status determination. UNHCR describes it as the 'pivot' upon which first instance determinations are made. Varying versions of events and experiences are often taken to imply lack of credibility and are therefore often used as a basis for a negative status assessment. The notion of credibility refers to whether the individual claimant's version of events and expression of well founded fear are considered believable by the status determination authorities.

founded fear of persecution in procedurally significant and appropriate ways.⁴¹ A number of Courts have identified this. A US District Court, acting in a criminal judicature, found that any inconsistencies in statements by the victims in the case were attributable to ‘still [being] under the influence of the trauma of [the crimes] and of perceived threats of family members.’⁴² The Guidance of the Swedish Migration Board similarly notes that in dealing with traumatised persons ‘the lack of details in an account (...) should be seen as a consequence of the abuse, rather than as a sign that the information she has given is not credible’.⁴³ However whilst trauma has been raised in a number of cases, it has not always been adequately addressed, or taken into account, by the courts as the Australian case *RRTA 794* illustrates.

The case involved a young female applicant who had been trafficked for the purposes of sexual exploitation. Her story, as recounted by the Court included particularly horrific experiences of abuse, violence and rape. The applicant was significantly traumatised, as noted by her representative. She was often unable to answer direct questions put to her by the tribunals through the various stages of the case. The applicants’ advisor submitted that: ‘victims of trauma cannot recall or don’t recognize the sorts of detail asked of her by the tribunal’ and that ‘responses accompanied by a high level of emotion are more likely to be truthful and that the applicant’s presentation during the hearing was consistent with this – she clearly was

⁴¹ A concurring opinion in *Matter of SMJ (BIA)* noted how: the often traumatic circumstances giving rise to asylum applications commonly result in information coming out seriatim, rather than the entire claim being presented in one piece’.

⁴² *US v. CORTES-CASTRO* Court of Appeals, 11th Circuit

⁴³ Sweden: Swedish Migration Board, *Gender-Based Persecution: Guidelines for Investigation and Evaluation of the Needs of Women for Protection*, 28 March 2001 15

emotionally affected by what had happened to her.’⁴⁴ Moreover, one of the expert witnesses in the case noted that:

The Tribunal’s questioning of the applicant in relation to her forced prostitution was inappropriate and unprofessional, given [how] vulnerable she continues to be. The Tribunal had done further damage to the applicant which it was to be hoped was not permanent.⁴⁵

The experts further highlighted that:

The Tribunal’s expectation that the applicant might be able to put names to her captors or her location, and the idea that she could go to the local police for protection, was also ‘naïve’.⁴⁶

This can be contrasted with the approach taken by the UK Courts in *AZ (Thailand)* where the court expressly recognised that the trauma associated with trafficking helped explain some of the procedural issues in the case, including the delays in applying which, as the court noted, was consistent with ‘the UNHCR guidelines which advise that women may feel ashamed of what has happened to them, or may suffer from trauma caused by sexual abuse and violence. The evidence we have before us confirms that the appellant experiences feelings of defilement, shame and lack of self-worth.’⁴⁷

This narrative raises a number of issues around the right to be heard in legal matters, and the responsibilities accruing on the relevant courts and tribunals, as well as on legal representatives, to ensure that trafficked persons get a voice in the determination of their own future. This includes the need for specific awareness of issues, including when and how interviews with traumatised trafficked persons are to

⁴⁴ *RRT Case No 1100482* [2011] RRTA 794, Australia: Refugee Review Tribunal, 15 April 2011 para 71

⁴⁵ *Ibid* para 86

⁴⁶ *Ibid*

⁴⁷ *AZ (Trafficked women) Thailand v. Secretary of State for the Home Department*, CG [2010] UKUT 118 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 8 April 2010 Para 116

be carried out in order to ensure that effective interviewing allows for adequate instruction to be given, and that the full story of the client is collected, ensuring that the best possible representation is provided.

Within the European context, a number of procedural safeguards are put in place to address vulnerability. The Procedures Directive⁴⁸ requires Member States to ensure that vulnerable applicants requiring special procedural guarantees are provided additional time and support in order to be able to better present their claim. The UNHCR Trafficking Guidelines also make a number of important provisions in this regard, both directly and through the reference to the 2002 Gender Guidelines.⁴⁹ The latter provide, *inter alia*, that:

Persons raising gender-related refugee claims, and survivors of torture and trauma in particular, require a supportive environment where they can be reassured of the confidentiality of their claim.

As Kaur rightly identifies, interviewing traumatised trafficked persons is one of the hardest skills to master.⁵⁰ Identifying a set of required skills is beyond the scope of the present research. The critical factor here is that adequately trained personnel are required in order to help overcome some of the procedural and substantive barriers faced by traumatised persons in seeking international protection. It must be acknowledged that other groups of asylum seekers also require specific attention in terms of interviewing including for instance children. It is positive to note in this regard that, for instance, the European Asylum Support Office⁵¹ offers a series of

⁴⁸ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)

⁴⁹ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01

⁵⁰ Kalvir Kaur (n 37) 104

⁵¹ The Malta-based European Agency plays a key role in the concrete development of the Common European Asylum System. It seeks to enhance practical cooperation on asylum matters and to help

training courses to status determination officials. These include, *inter alia*, sessions on interview techniques and others on interviewing vulnerable persons. The latter requires 20-30 hours of online training and 3 days of face-to-face meetings including 1.5 days on didactics and online coaching.

7.2.3 Awareness of the Processes

Another procedural vulnerability relates to the lack of awareness of the asylum seeking processes and language barriers. The asylum seeking processes in most countries are constantly changing complex processes involving multi-layered determinations. Whilst this is sometimes difficult to understand for the trained advocate, it becomes a disempowering and disenfranchising process for asylum seekers, and especially ones already significantly traumatised and who may feel that they have lost control over their life. A limited number of court hearings attended during the preparation of this research identified this reality. Asylum seekers were only in the court-room if there was the need to be examined or cross-examined. The impression taken is that the process is for the lawyers, and the client is a necessary accessory, but not the central feature of the claim. Combining this with the loss of control experienced in the context of trafficking raises questions and concerns regarding the empowering role of legal representation and asylum seeking itself.

relevant parties in fulfilling their international and European legal obligations. In its own words 'EASO acts as a centre of expertise on asylum' and provides support and assistance to Member States whose asylum and reception systems come under significant pressure. It is also heavily involved in the provision of training to various stakeholders, including status determination bodies. See for more: <http://easo.europa.eu> [last accessed: 5 October 2013]

7.2.4 Language Barriers and the Use of Interpreters

The alienation of the trafficked person from the process is further expounded by the fact that asylum seekers often do not know the language that the process is being undertaken in, an issue which, whilst in some cases is remedied through the presence of an interpreter, in others it further excludes asylum seekers from the legal process. Interpreters are usually appointed directly by the court or tribunal, often through an agency offering these services. They play an important part in the process and can have significant impact on the ability and willingness of an asylum seeker to disclose and discuss their experiences. It is the duty of any interpreter to 'interpret accurately, fully, distinctly and audibly using appropriate language and emphasis.'⁵² Their role is to be impartial and to bridge the linguistic gap between the parties. 'Interpreters should not advise, or make judgments about the applicant and his/her experiences'.⁵³ It is critical therefore that interpreters are carefully chosen not only on the basis of their language skills but also on the basis of gender, religious belief, cultural affinity, and ethnic suitability in the particular case.

A concern raised in some situations is the possibility that the interpreter might use information discovered through his work to leverage an applicant. These issues are exacerbated in smaller contexts where interpreters often hail from the same community as the asylum seeker. As Crawley points out 'it is not difficult to imagine the reluctance of a female applicant to testify about her experiences through a male (or even female) interpreter who is a member of her community.'⁵⁴ Some stories have emerged of interpreters passing subtle judgmental comments to a client in her

⁵²Heaven Crawley, *Refugees and Gender: Law and Process* (Jordan 2001) 204

⁵³ *Ibid*

⁵⁴ *Ibid*

interviews (often these revolved around women who'd worked in the sex industry). This is likely to significantly hinder the willingness and ability of the applicant to adequately present her case.⁵⁵

7.2.5 Specialised Legal Advice

The OHCHR guidelines on Human Rights and Human Trafficking⁵⁶ make requirements on the treatment of trafficked persons within legal processes. In particular it provides that States and other responsible entities should consider ensuring that legal proceedings in which trafficked persons are involved are not prejudicial to their rights, dignity or physical or psychological well being.⁵⁷ It is disappointing to note that the guidelines then go on to focus the provisions only onto cases involving the trafficker/exploiters, thereby re-affirming the criminal justice approach that has also been problematized earlier in this thesis. Negative practices within protection oriented processes may also be prejudicial to the right of dignity and well being of the applicant and these considerations should therefore also be taken into account.

Guideline 6(5) provides that trafficked persons should be provided with legal and other assistance in relation to criminal, civil or other actions against traffickers/exploiters. As noted elsewhere in this chapter, legal representation in protection oriented legal processes is also a critical requirement. The UNHCR Trafficking Guidelines note the need to ensure that trafficked persons have access to proper legal counselling if they are to be able to lodge an asylum claim effectively.

⁵⁵ UNODC, *Anti-Human Trafficking Manual for Criminal Justice Practitioners* (United Nations 2009)

⁵⁶ OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (United Nations 2010)

⁵⁷ Ibid

Throughout this research it became increasingly clear that a handful of lawyers and legal experts have focused on human trafficking including, in some cases, on the immigration dimension of such cases. As the research by the Poppy Project entitled ‘Hope Betrayed’ amply illustrates, there is a danger in trafficked persons being advised by non-specialist lawyers as this might prejudice their asylum claims. One clear example is that of Vietnamese children being convicted of cannabis cultivation. Apprehended whilst on the cannabis farms themselves, they were charged with cultivation and distribution of drugs and advised by their lawyers to plead guilty. Having received a penalty of two years they are considered a threat to public order and therefore received an automatic deportation order. These cases highlight the need for greater awareness amongst different elements of the legal profession as to the reality and indicators of human trafficking. The state of play came under scathing criticism from the Court in the 2008 case of *R v. O*⁵⁸ (not an asylum case, but the argument holds) where Lord Justice Laws in the Court of Appeal stated:

We hope that such a shameful set of circumstances never occurs again. Prosecutors must be aware of the Protocols which, although not in the text books, are enshrined in their Code. Defence lawyers must respond by making enquiries if there is before them credible material showing that they have a client who might have been the victim of trafficking, especially a young client.⁵⁹

Some efforts are being made in this regard, including peer-training initiatives for the legal professions. Such efforts are, however, hindered by the contradictory stands being taken by the courts, the broad discretion exercised by courts and prosecutors, and the reluctance of prosecutorial guidance to take a clear and unequivocal stand.

⁵⁸ *R v. O*, [2008] EWCA Crim 2835, United Kingdom: Court of Appeal (England and Wales), 2 September 2008

⁵⁹ *Ibid* para 26

7.2.6 Status Determination Competence

Closely associated with the issue of competent legal representation is the issue of competent status determination authorities. The European Union Asylum Procedures Directive makes a number of requirements on status determination authorities that might prove vital to a positive experience of the asylum seeking process for trafficked persons. A review of trafficking based asylum claims identifies low levels of awareness of trafficking and its implications by many stakeholders involved in presenting, arguing and deciding cases. At times this is reflected in statements that make it into judgments, including, for instance, statements to the effect that a trafficked person is not likely to be re-trafficking because he/she should now know better.⁶⁰ The substantive side of these issues has been discussed in Chapter 3.

The recast Directive now requires specific training on trafficking for status determining authorities, which is particularly relevant when dealing with claims made by individuals who might not fit the image of the typical asylum seeker. Some trafficked persons will be suffering from trauma from their experiences. Such trauma may negatively impact on the way trafficked persons experience the asylum process, and in particular their ability to present their asylum claims in a procedurally significant way. In some cases this will impact on the trafficked persons' credibility, as not all status determination authorities adequately cater for the impact of trauma. Furthermore, procedural safeguards ought to be put in place in order to ensure that trafficked persons feel safe in recounting their stories.

⁶⁰ See for instance: *HC & RC (Trafficked Women) China v. Secretary of State for the Home Department*, CG [2009] UKAIT 00027, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 18 July 2009 para 84

Part 3: Evidentiary Issues

Another key procedural issue that arises is the one of evidence and relates to the sources that status determination processes use to substantiate asylum claims. Particular attention is given here to the US State Department's annual Trafficking in Persons Report, as this is the most widely quoted source in the area, and the only existing analysis of anti-trafficking measures with a global reach.

7.3.1 The Trafficking in Persons Report

This section addresses the relevance and value of the Trafficking in Persons Report as an evidentiary tool in the context of refugee status determination. The Trafficking in Persons Report is issued by the United States Department of State annually and includes an assessment of counter-trafficking efforts by the countries assessed. The report's legal basis is in the Trafficking Victim Protection Act of 2000.⁶¹ Each country is ranked in one of 4 Tiers depending on their adherence to the minimum standards set out in the Victims of Trafficking Protection Act. The ranking system is as follows:

Tier	Explanation
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⁶¹ *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008* [United States of America], Public Law 110–457, 23 December 2008

Tier 1	Countries whose governments full comply with TVPA's minimum standards for the elimination of trafficking
Tier 2	Countries whose governments do NOT fully comply with TVPA's minimum standards but are making significant efforts to bring themselves into compliance with those standards.
Tier 2 Watch list	Governments whose governments do not fully comply with the TVPAs minimum standards, but are making significant efforts to bring themselves into compliance with those standards AND, the absolute number of victims is very significant or significantly increasing, AND there is a failure to provide evidence of increasing efforts
Tier 3	Countries whose governments do not fully comply with the minimum standards and are not making significant efforts to do so.

Table 2: Tier Ranking under the US Trafficking in Persons Report

The Department of State prepares the report using information collected by US Embassies, government officials, non-governmental and inter-governmental organisations, published reports, regional research trips and information submitted directly to the TIP Report office. Research carried out by embassy officials includes ongoing monitoring of media coverage and meetings with a range of governmental, non-governmental, academic, media and other stakeholders.⁶²

The report remains a key source of information and assessment on counter-trafficking efforts around the world. It has raised awareness of the issue and undisputedly has considerable impact on the direction of anti-trafficking measures on both the national and international levels, and indeed to many States the report provides a primary incentive for anti-trafficking initiatives. Taking the example of Malta, it is clear that a number of actions have been taken primarily (if not solely) in

⁶² United States Department of State, *Trafficking in Persons Report 2011* (USDOS 2011) 11

views of the threat of a negative assessment by the TIP Report. Launching the 2013 edition of the report Secretary of State Kerry noted how research found that States are twice as likely to act on trafficking issues if listed in tier two watch list or tier 3.⁶³

Attributing developments to the report is, however, difficult, as various other factors will also influence States' actions in this context, including, but not limited to, signature and ratification of international instruments and pressure by civil society organisations in the particular country. Despite this potential, the report is severely criticised on both ideological and substantive grounds, and a number of shortcomings are identified. Its existence and purpose is flagged by some who challenge the US' self declared role as 'global sheriff' in the field of trafficking. The report builds on a historical culture of US Congressional oversight of foreign governments' actions in areas considered politically important, including human rights, religious freedom and narcotics management. The annual human rights reports, which have been in existence since the 1970s, have been considered, including by organisations producing similar assessments, as an important and effective tool for holding governments accountable. The trafficking report, however, differs from the human rights report in at least 2 ways. First it is linked to a ranking system and second, it is attached to a system of sanctions which may be imposed based on that ranking.

Others challenge the report's nature as a political document. Gallagher eloquently describes the report as 'political creature, produced through a political process and serving specific political ends.'⁶⁴ This links to the criticism of the report findings as reflecting an entrenched bias where US allies are likely to get a positive ranking whilst

⁶³ Speech by Secretary of State Kerry at the launch of the 2013 Trafficking in Persons Report

⁶⁴ Anne T Gallagher, 'Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of the US Trafficking in Persons Reports' (2011) 12 Human Rights Review 392

States less favourable to the US are negatively ranked. Gallagher notes a number of important developments in this regard but admits that:

Key allies will likely need to underperform more flagrantly than less valued ones to be bumped off Tier 1. Political and ideological opponents of the USA may never be moved from Tier 3, no matter how much they try to conform to the TVPA minimum standards.⁶⁵

This criticism was exacerbated by the fact that the report did not include an assessment of the US Government's own efforts. This issue has now been remedied, and since 2010 the US is also included in the report. This change of policy was possibly intended to appease the most obvious of criticisms made against the report. Not surprisingly, the USA has consistently been placed in Tier 1.

A more important challenge relates to the integrity of the report in terms of methodology and data. Whilst since the first reports data deficiencies are now better acknowledged, the report continues to rely on un-cited and unconfirmed sources including data received from national governments under threat of downgrading. The methodology section of the report is worryingly low key, providing very general information in two short paragraphs. This has caused some commentators to describe the process of assigning tier ranking as arbitrary and unfounded. Indeed one review of the reports argued that some of the minimum standards set out in the report are themselves subjective.

As Gallagher rightly identifies, a fundamental problem with the report is its reliance on standards set within the United States' national legislation rather than on internationally agreed standards. This is even more disconcerting when considering that there are indeed international standards upon which such an assessment could

⁶⁵ Ibid 392

be carried out. Despite significant normative convergence between the two sets of standards, this does not reach the point of full symmetry.⁶⁶ Linked to this is the report's failure to differentiate between 'trafficking for prostitution' and 'sex work' and the strength with which it promotes an abolitionist stance on prostitution. Whilst this has to some degree been remedied in recent years, the report does not as yet draw the line between the two as required by the international legal instruments.

Another key critique of the report is its over-reliance on quantifiable data on cases – number of prosecutions and convictions, without in depth analysis of levels of prosecutions (at what level of the exploitation ladder was the accused involved). This can sometimes give a skewed picture of the situation on the ground.⁶⁷ To put it bluntly: prosecuting one high level trafficker might be more effective in reducing the number of trafficked persons than prosecuting 10 low level operators. Moreover, a review of the report found, *inter alia*, that there were doubts as to the reliability of the data and numbers promoted by the TIP report, linked in particular to the limited availability, reliability and comparability of the data from the national level. Ranking decisions are described as incomplete and leading to inconsistent decisions regarding the application of US Government funds.

The TIP report also fails to adequately reflect and acknowledge the possible collateral damage of counter-trafficking measures on the human rights of trafficked persons and other persons involved in trafficking. Such measures, including for instance discriminatory treatment of women, may, in some cases, be of such severity, repetition or nature as to amount to persecution themselves. The reluctance (read

⁶⁶ Ibid 381

⁶⁷ For an eloquent elaboration of some of the challenges facing prosecutions see: Amy Farrell, Colleen Owens and Jack McDevitt, (2013) 'New Laws but Few Cases: Understanding the Challenges to the Investigation and Prosecution of Human Trafficking Cases' *Crime, Law and Social Change* 1

failure) to engage with these limitations further jeopardise the credibility of the TIP report generally, and as a tool in the context of refugee status determination.

The report has improved significantly over time. Its geographic scope now covers all countries as opposed to States of origin, transit and destination for significant numbers of people. This means that the analysis went from 83 country overviews in 2001 to 177 in 2010. Its thematic scope has also been broadened from a strict focus on transnational movement for sexual exploitation to both national and transnational trafficking for a wider spectrum of exploitative purposes. There is also a greater deal of explanation in the report, better highlighting of the reasons for the specific ranking.

Another critical issue in assessing the relevance of the TIP report within the context of trafficking based asylum claims, is that the majority of the indices applied by the report do not specifically deal with the protection of trafficked persons upon return. The only protection relevant indicator is one which deals with the protection of persons trafficked into the country in question rather than the trafficking of its citizens abroad.⁶⁸ This therefore places considerable doubt on the usefulness of the TIP Report within the context of Refugee Status Determination.

Other commentators take a somewhat surprisingly positive approach to the report. Mattar, for instance, describes the report as a comprehensive and well drafted document, describing it as constituting 'the primary reference and main source of information on efforts made by foreign governments to combat trafficking in

⁶⁸ Dorevitch and Foster (n 1)

persons'.⁶⁹ He argues that beyond being a mere diplomatic tool, the report also serves an educational function.

Gallagher's assessment of the TIP report ends with a number of recommendations including, *inter alia*, that the State department should warn against the use of the Report as the sole or primary source of authority for critical decision making, citing refugee status determination as an example. This is further to her assertion, to which the author agrees, that:

A document such as the TIP Report should not be presented as a definitive statement of fact that can be relied upon by, for example, national refugee determination agencies in deciding whether or not a victim of trafficking has a valid claim for asylum.⁷⁰

And yet the vast majority of country of origin information packages about trafficking centre around entries from the reports. This can partly be explained by the lack of viable alternatives. As Gallagher rightly identifies, there are no real alternatives to the TIP report that provide similar information, analysis and assessment. She partly defends the report by rightly highlighting that the 'TIP reports are not displacing a potentially superior alternative, or performing a function that could be better discharged by the international community'.⁷¹ Research participants highlighted how the TIP report is a necessary evil, and whilst it has a number of grave concerns, it remains the only 'reliable' source of analysis and information in this regard.

The Trafficking in Persons Report is not the only output of the United States' Department of State relevant to the assessment of trafficking based asylum claims. Many judgments and determinations refer to the US State Department Report on

⁶⁹ 'Trafficking in Persons: The European versus the US Approach' (2005) 11 War Against Trafficking Alliance: Brussels

⁷⁰ Gallagher 'The US Trafficking in Persons Report' (n 63) 393

⁷¹ *Ibid* 392

Human Rights Practices that often includes specific sections about human trafficking and/or relevant issues, including gender equality, poverty and general human rights standards in the specific country, including the prevalence of corrupt practices.

7.3.2 Country of Origin Information and Country Guidance

The Qualification Directive requires Member States to:

Ensure that precise and up-to-date information is obtained from relevant sources, such as the United Nations High Commissioner for Refugees and the European Asylum Support Office.⁷²

It is pertinent to assess the way in which issues surrounding trafficking are addressed in country of origin information prepared to inform status determination procedures. Status determination invariably refers to country of origin information, and whilst some countries prepare their own notes, others refer to the country of origin information (COI) provided in other countries. This chapter will in particular address the way in which trafficking is addressed in COI in the UK.

From the 29 OGNs⁷³ available on the UKBA website, only 3 have specific sections on trafficking whilst another 4 make reference to trafficking whilst not having a specific section dedicated thereto.⁷⁴ This can be compared to 10 OGNs which have specific sections on LGBT matters and 6 having similar sections on domestic violence.

⁷² Article 8(2)

⁷³ Operational Guidance Notes (OGN) summarise the general, political and human rights situation in a particular country, and describe common types of asylum claim. Country policy bulletins provide clear guidance on dealing with country-specific issues that arise in asylum and human rights applications. They are to be distinguished from the Country of Origin Information. The latter are meant to be accurate, balanced and relevant with up-to-date information on asylum seekers' countries of origin, to be used by UKBA staff when determining asylum applications.

⁷⁴ The OGN for China, for instance, mentions trafficking as one of the activities in which organised crime is involved.

One notes, however, that when one juxtaposes the OGNs with the countries on the top 10 in the Serious Organised Crime Agency (SOCA) rankings of countries from where people are trafficked into the UK one notes that:

1. Out of the ten, 3 are EU Member States and therefore asylum is not an option.
2. OGNs on 3 out of the remaining 7 have a section on trafficking namely Nigeria, Vietnam and Albania.
3. One OGN, namely China has a minor reference.
4. The remaining 3 have no reference to trafficking.

Trafficking in COI Packages

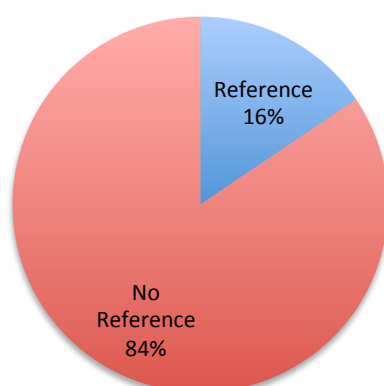


Figure 12: Trafficking in COI Packages

Trafficking in COI Packages - SOCA Countries

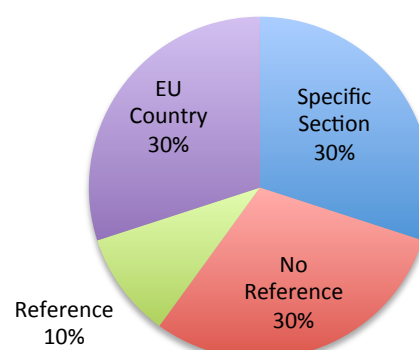


Figure 13: Trafficking in COE Packages for Countries identified by SOCA

As the number of trafficking based claims increases, so will the likelihood of these issues being mainstreamed into the existing OGNs. The situation improves when one looks at the Country of Origin Information where a section on trafficking in persons is regularly featured. In some reports this is based exclusively on the findings of the US TIP Report whilst in others a range of sources are used, including: interviews with the

UN special rapporteur on human trafficking, IOM reports, UNODC reports, articles in newspapers and more still, academic work, reports by organisations such as Human Rights Watch and Womenshelter, as well as the Danish Immigration Service Fact Finding Missions. This is positive. The information provided must always, however, be considered carefully as the reliability thereof may sometimes be questionable.

7.3.3 Country and Trafficking Experts

Many of the cases assessed in the course of this research, especially at appeal tribunal stage, relied on a number of expert witnesses or reports submitted by such experts. As Symes and Jorro note: ‘whether such persons are strictly speaking ‘experts’ matters less in informal proceedings than the weight that their evidence deserves in the light of all the circumstances’.⁷⁵ The role played has tended to be, at least based on a cursory assessment of the analysed cases, in support of the applicant via supplementing and clarifying existing country information and focusing existing knowledge to the case of the particular applicant.

There are broadly speaking four types of experts intervening in these cases that can be split into two categories. The first category is what can be termed subject witnesses, and these are divided into country specialists and trafficking specialists. Their role tends to involve raising awareness of the trafficking component in a case, highlighting the trafficking indicators and/or informing the court of the situation in the country of origin. These experts tend to come from a variety of backgrounds including academics, researchers, NGOs based in the country of asylum and NGOs

⁷⁵ Mark Symes and Peter Jorro, *Asylum Law and Practice* (Lexis Nexis Butterworths 2003) 731

based in the country of origin. The other set of experts include medical and personal references including counsellors, psychologists and medical foundation representatives who inform the court of the personal and social circumstances of the individual applicant and the likely impact of return on the individual's wellbeing. This will include information about the medical and psychological history, impact of trauma and the situation of the applicant in the country of destination. Medical experts can also provide reports on the medical conditions diagnosed in the individual applicant. This might be useful in determining cases of continuing persecution especially in the context of trauma. Medical evidence will help validate the applicant's recollection of past events.

On this latter point it ought to be noted that the Qualification Directive obliges courts to allow for medical evidence to be collected and presented. Article 18 provides that:

Where the determining authority deems it relevant for the assessment of an application for international protection in accordance with Article 4 of Directive 2011/95/EU, Member States shall, subject to the applicant's consent, arrange for a medical examination of the applicant concerning signs that might indicate past persecution or serious harm. Alternatively, Member States may provide that the applicant arranges for such a medical examination.

7.3.4 The Value of the UNHCR Guidelines

The UNHCR Trafficking Guidelines, as adopted in 2006, have been introduced and referred to throughout this research. A key strength of the guidelines is that they address different forms of trafficking including different modes of exploitation. This is a positive development over the UNCHR's engagement with the issue of trafficking until then and reflects the learning process that international organisations undertake with new legal instruments of relevance to their area of work.

An assessment of the substantive Guidelines, however, identifies a number of weaknesses that put into question the guideline's usefulness and persuasiveness in terms of establishing legal principles. These weaknesses are understandable considering the need for a case-by-case determination and, therefore, the guidelines appear to merely highlight some potential scenarios allowing discretion to the specific jurisdiction to apply these. The Guidelines do however imply specific things including, for instance that former victims of trafficking should be considered as a particular social group.⁷⁶ In the most part however they use weaker terminology of 'may be' rather than 'is' or 'are'. This has resulted in courts taking only a cautious look at the guidelines and determinations such as the one in *SB Moldova* where the court expressly noted that:

Whilst we have found the UNHCR's Trafficking Guidelines (pages 1541 to 1557 of bundle 4) informative, they did not provide much assistance in enabling us to determine whether, as a matter of legal analysis, "former victims of trafficking" or "former victims of trafficking for sexual exploitation" are capable of being members of a particular social group.⁷⁷

Overall, the guidelines are very cautious and do not adequately reflect the nuances of human trafficking and the underlying understanding of the violence that underscores the relationship between trafficker and trafficked person.

Various States have also issued their own guidelines, in the large part replicating the UNHCR guidelines and further developing procedural issues. In the UK the guidelines refer to the need for secure accommodation and include a series of indicators of trafficking.⁷⁸ In some cases, whilst no trafficking specific guidelines have been set out, other guidance notes make provisions which are relevant to trafficked persons (or

⁷⁶ UNHCR Trafficking Guidelines

⁷⁷ Ibid para 109

⁷⁸ UKBA, *Victims of Human Trafficking - Guidance for Frontline Staff* (UKBA 2013)

specific subsets thereof). These include gender guidelines as well as more procedural guidelines on, for instance, the treatment of vulnerable persons within the status determination processes.

7.3.5 Other relevant sources

This research has highlighted the relevance of a number of other areas in determining vulnerability to human trafficking and the validity of trafficking based asylum claims. These included corruption, poverty and human security. Whilst an assessment of each of these areas will be difficult for courts, they ought to be looking at the general picture in the country referring to all available information and therefore using relevant sources. Lawyers, and other representatives, ought to assist the status determination processes in this endeavour not least by making this information available through their case bundles or arguments. We now turn to a brief exposé of some of these sources, aimed primarily at giving a snapshot of what information is available and how it can be useful. These indices have also been used in previous chapters, most notably the discussion on interstices in chapter 3.

- The Human Development Index developed by the United Nations aimed at the creation of a single statistic that serves as a frame of reference for both social and economic development. The index gives countries a score of between 0 and 1 depending on their level of human development with 0 reflecting no level of human development and 1 reflecting a high level thereof. These are broadly broken down into 4 levels of human development, namely: very high, high, medium and low human development. The index is based on data provided by a variety of public international sources and which represent the best and most current statistics available for those indicators at the time of

the preparation of the report. The HDI Index can provide a valuable source in assessing general societal vulnerability to trafficking in a particular country.⁷⁹

- The Corruption Perception Index is a product of Transparency International, possibly the largest and best-known organisation working to fight corruption. The Index rates countries according to how corrupt their public sectors are perceived to be by the general population. CPI is a composite survey based on data collected by a number of reputable institutions. Assessing corruption on the basis of perceptions thereof has strengths and weaknesses. In a context where increased efforts to identify and curtail instances of corruption are made, there is likely to be heightened media attention of such cases resulting in people 'perceiving' a higher level of corruption than would possibly be the case where no such efforts were undertaken and cases of corruption were not, as a result, widely publicised. However, considering the difficulty in finding adequate data, capturing perception remains the most reliable method of assessing and comparing corruption levels.⁸⁰
- The Human Security Index builds on the Human Development Index. This explains the close correlation between the two indices. The index also feeds off a number of existing indices held by the United Nations and other international and national governmental organisations. The index is based on 3 core components, namely the economic fabric index, the environmental

⁷⁹ See: UNDP, *Human Development Report 2013 - The Rise of the South: Human Progress in a Diverse World* (2013). Available at: http://issuu.com/undp/docs/hdr_2013_en/1 (Last Accessed: 5 October 2013)

⁸⁰ See generally: Transparency International, *Corruption Perceptions Index 2012* (Transparency International, 2012)

fabric index and the social fabric index. It describes itself as an index of 30+ leading economic, environmental and social indicators.⁸¹

It is interesting to note that whilst the TIP Report ranking is quoted in almost all of the cases, virtually no reference is made to the other two indices. This may be explained through a variety of factors including: the need to argue ‘personalised’ harm, the more issue focused nature of the TIP report and its origin within the US government rather than less official entities. Whilst statistics about trafficking and its causes and consequences remain lacking, this paper has highlighted the existence of some indicators that can be used in order to identify trends and situations. It is argued here that reference to such further sources can support a claim that one’s fear of trafficking related persecution in the country of origin is well-founded.

Part 4: Other Procedural Issues

7.4.1 Rules of Precedent and Restrictive Interpretations

A key issue that arises from *SB Moldova* is a procedural one. Whilst the test applied by the court was considered to be wrong, the case could not be appealed because the appellant was successful in her claim. *SB Moldova* is, however, a published decision and therefore has an impact in how future cases are decided. One research participant noted how trends in decisions by UKBA status determination officials tend to follow trends in cases decided by the courts so that for a period after *MP Romania* most trafficking based claims were, for instance, being rejected. This is an area where procedure and substance collide and this could cynically be seen as a strategic move

⁸¹ See generally: <http://www.humansecurityindex.org/> [last accessed: 5 October 2013]

by the Courts to ensure a legal basis for the restrictive interpretation and application of the Directive.

In *VXAJ*⁸² a key issue was raised regarding the court's assessment of the material in front of it. It highlighted the importance that all information is evaluated thoroughly and not only selectively, including information likely to support the 'applicant's claim'. On the other hand it is important that all evidence in a particular case be considered as a whole especially when medical evidence is produced to establish past experiences of trafficking and trauma as this will likely impact on the approach the decision maker should take to the evidence emanating from the applicant.

7.4.2 Inconsistency In Determinations

The issue of consistency in status determination is a concern that has been raised to different degrees in research across various jurisdictions. Wherever research has been carried out, wide inconsistencies have been identified between and within jurisdictions as to 'how likely a claim is to succeed'.⁸³ It is hypothesised here that in a context so morally charged, and so complex, as human trafficking (and especially in situations of sexual exploitation) the level of such inconsistency is likely to be higher than in other areas, especially in areas which fall into the more traditional image of what refugee law should be addressing. There is unfortunately insufficient data to carry out this assessment, as it is virtually impossible to determine how many

⁸² See page 18.

⁸³ See for instance: Jaya Ramji-Nogales and others, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (NYU Press 2010)

trafficking based asylum claims have been determined in different jurisdictions.⁸⁴ A number of issues do however stand out.

First. Having a lawyer who is well versed in trafficking (understood as: one of a select few lawyers considered to be knowledgeable in the area) is likely to increase the likelihood of your success considerably. In the UK, for instance, fingers point to a small number of lawyers (around four or five) who have extensive experience with such claims and an established track record of successfully litigated cases. This supports the findings of Ramji-Nogales et al relating to all asylum cases, that representation is 'the single most important factor affecting the outcome of her case'.⁸⁵ This is further confirmed by research by the Poppy Project that found that representation was a critical factor in determining the outcome of a case. Reasons for this include the complexity of the asylum process and of the legal issues inherent in any trafficking based asylum claim.

Second. The awareness and interest of the tribunal or court, and their approach towards the trafficked person and the issues, will have a significant impact on the outcome of the case. As research participants noted you can sometimes tell the likely outcome of a case by the name of the judge or tribunal members in front of whom you would be appearing.

Third. There is significant inconsistency between first instance decisions and the higher-level tribunals. Put differently, there is a significant percentage of decisions which get overturned upon appeal. In 2006, the Poppy Project reported how all 26 claims decided by the UKBA had been rejected. Of these, 12 decisions were

⁸⁴ Not all jurisdictions keep data about cases coded in the same way making it virtually impossible to determine, with any level of accuracy, the number of claims relevant to trafficking.

⁸⁵ Ramji-Nogales and others (n 80)

overturned upon appeal, only 3 were dismissed on appeal, 4 women lost contact with the POPPY project prior to appeal, 1 was granted residence as an EU citizen and 5 cases were still on-going. Of the 12 positive decisions, 9 were recognised as refugees and 3 were granted protection under the human rights provisions. This is greater than official figures on appeals whereby Governmental statistics indicate that in 2012, for instance, around 25% of appeals considered were allowed.⁸⁶ Efforts in various jurisdictions are being made in order to improve first instance decision-making; however / but the results of these initiatives will take some time to become apparent. One such initiative is the 'Quality Initiative Project' managed by the UNHCR UK office and which sought to improve the quality of first instance decision-making in the UKBA.⁸⁷

Developing consistency in status determination is now considered a priority for a number of status determination authorities across jurisdictions. Whilst not specifically linked to trafficking based asylum claims, such measures have the potential of improving the asylum seeking experience of trafficked persons as well.

Part 5: Concluding Remarks

This chapter has sought to identify some of the key procedural issues facing trafficked persons as they manoeuvre through their search for protection. The relevance of this discussion stems from the underlying principle of *non-refoulement* and the potential consequences of wrongful decisions in this area. As noted at the outset of this analysis, the protection potential of asylum will only be meaningful if trafficked

⁸⁶ Oliver Hawkins and Richard Cracknell, *Asylum Decisions: Social Indicators - Commons Library Standard Note* (House of Commons 2013)

⁸⁷ See for more information: <http://www.unhcr.org.uk/what-we-do-in-the-uk/quality-initiative-and-integration.html> [last accessed: 5 October 2013]

persons have effective access to the asylum procedures, that the procedures are carried out in a fair and transparent manner which adequately caters for the individual's vulnerability, if procedural safeguards are put in place and if critical attention is paid to all relevant sources of information. These issues will also significantly impact on the way trafficked persons experience the asylum process and their overall search for protection.

Conclusion

Human trafficking is a human rights violation perpetrated on a massive scale in virtually every part of the globe. Its multiple manifestations and the complex nature of the phenomenon have not been effectively met by the international (legal) response to the crime, despite the heightened political and public outcry about the crime. This research has sought to underpin some of the key arguments around human trafficking, focusing specifically around the issue of recognition of trafficked persons as refugees.

Throughout this thesis, the complex intersections between human trafficking and asylum as well as other interconnected issues and legal frameworks have been highlighted. First, trafficking and asylum intersect and intertwine in various ways beyond the viability of refugee status as a channel for the long-term protection of trafficked persons. Second, the determination of refugee status for trafficked persons requires more nuanced assessments and analysis than are commonly made. This requires more adroit reference to obligations and requirements enshrined in legal instruments from several bodies of law, including international and transnational criminal law, human rights law, migration law, humanitarian law and labour law, among others. Third, entities and agencies at the national, European and International level have had to, and have to continue to, come together to address the issue of trafficking, specifically the long-term protection of trafficked persons.

This is suggested while acknowledging current efforts towards cooperation and with full understanding that such cooperation has not always been an easy process.

Protection within the existing anti-trafficking instruments is discretionary, conditional and limited in scope. It reflects the dominant law enforcement paradigm that clearly underpins it. Refugee law, on the other hand, protects a wider group of persons, from a wider spectrum of harms, because the primary focus is the risk of harm to the individual as opposed to the interests of the criminal justice process. This reflects what Lord Hope eloquently describes as the 'broad humanitarian principles which underlie the (Refugee) Convention'.¹

Although refugee law will not protect all trafficked persons, it is an important alternative channel for protection that significantly expands the scope of protection. This thesis has convincingly shown that whilst a progressive and liberal interpretation of the Refugee Convention has been attempted by lawyers and courts alike to cover trafficked persons, a significant number of trafficking-based claims could be made out even if a more restrictive interpretation is adopted. This is argued, *inter alia*, on the basis of the past persecution presumption, the relative importance of State actors in trafficking related persecution (albeit indirectly at times) and the use of the more clear-cut Convention grounds set out in the refugee definition.

Proving well-founded fear in the context of trafficking-based asylum claims requires courts and tribunals to look beyond the usual sources in order to address a variety of vulnerability factors whilst assessing these within the personal, social, legal and political circumstances of the particular asylum applicant. Trafficked persons' past experience(s) of trafficking provides a strong presumption that the expectation of

¹ *Hoxha & Anor v Secretary of State for the Home Department* [2005] UKHL 19 (10 March 2005) para 6

further trafficking-related harm is well-founded, unless, and until, there is a significant and lasting positive change in the country of origin. State protection, including State obligations, ought to be assessed beyond the strict anti-trafficking requirements, as many vulnerabilities in the context of trafficking can be, and are, addressed in various international regimes. This reflects the inter-sectionality to which reference has been made throughout this thesis.

Trafficking qua trafficking, as defined in the international instruments, is a human rights violation and amounts to persecution as recognised by international legal instruments and case law from a variety of jurisdictions and courts. This has important ramifications not least in bringing manifestations of trafficking beyond sexual exploitation within the scope of protection, thus overcoming the traditional stereotypical focus on women and girls exploited in the sex industry. Trafficking, and harms related thereto, are often transnational, challenging the traditional dichotomy between state of origin and persecution on the one hand and State of protection on the other. Agents of such harm vary from the State to non-State actors including family members and other acquaintances. Applying the Articles on State Responsibility of the International Law Commission, including the rule on attribution, places many more cases of trafficking within the purview of State persecution. This will in turn make claims for international protection easier to prove, and fits squarely within even more restrictive interpretations of the refugee definition.

The Courts' application of the particular social group ground to trafficked persons has been inconsistent and fraught with challenges. Whilst it has been argued that trafficked persons fulfil both the immutable characteristic and the social perception tests, the confusion created by the case law can be overcome by explicit legislative

direction, as is the case under the Norwegian Immigration Code. Such provisions cover all manifestations of trafficking, moving away from the gendered stereotype which has brought trafficking-based claims into the realm of difficulties associated with gender-based claims under international refugee law. Moreover, the way racial and ethnic background influence vulnerability to trafficking, targeting by traffickers and the protection available from the State means that race, as a listed ground in the Convention, should also be considered in arguing trafficking-based claims. This again moves such claims into the safer area of Convention grounds which are explicitly set, avoiding the need for liberal interpretations of the definition of refugee.

Whilst trafficked persons are victims of human rights abuse, traffickers are perpetrators of human rights abuses and of serious crimes, bringing them within the purview of persons to whom exclusion and revocation clauses can be applied. Conversely, trafficked persons who commit serious crimes as a result of their trafficking situation (read: are made to commit such offences by their traffickers) should benefit from the non-criminalisation clauses in the anti-trafficking instruments in order to avoid exclusion from refugee protection. This is a fundamental requirement of the human rights-based approach, and it is argued here that excluding trafficked persons from such protection would significantly jeopardise their human rights.

The protection potential of asylum will only be meaningful if trafficked persons have effective access to the asylum procedures, if the procedures are carried out in a fair and transparent manner which adequately caters to the individual's vulnerability and particular needs, if procedural safeguards are put in place, and if critical attention is paid to all relevant sources of information. Legal and practical barriers to accessing

status-determination protection need to be removed including through the provision of information. The implications of trafficked persons' trauma ought to be considered in the process whilst all relevant sources should be critically considered in determining whether the individual applicant's expectation of trafficking-related harm is well-founded. This again reflects the inter-sectionality requirement, both in terms of information considered and the institutional frameworks invoked.

Overall, this research has highlighted inter-sectionality as a fundamental approach to the determination of trafficking-based asylum claims. This reflects the inter-dependence of different areas of international law, and the need to consider international law and international legal instruments as one body of law. First, it is argued that there is significant protection potential at the interstices between transnational criminal law and international refugee law in terms of the protection of trafficked persons. Second, in applying the relevant definitions, legal instruments from across a wide spectrum of legal fields, including at a minimum criminal law (national, transnational and international), human rights law, migration law and labour law, should (continue to) be applied. These interstices provide a complex, yet useful yardstick, for status-determination of trafficking-based asylum claims.

Opportunities for judicial and legislative dialogue have been identified throughout the research, even if not explicitly elaborated upon. Court decisions clarifying how trafficked persons match the refugee definition should be considered by other judicial bodies within and across jurisdictions. Legislative developments (such as the one in Norway which has been mentioned above) can also inform legislative and judicial approaches across other jurisdictions.

This research has furthermore argued against the assertion that the applicability of the Geneva Convention to trafficked persons is problematic because they do not fit into any of the categories recognised by the Convention as giving rise to refugee status. On the contrary, this research has amply demonstrated that trafficked persons, as the example of modern victims of human rights abuse par excellence, are examples of who refugee law—with its humanitarian and human rights imperatives—should be protecting. This assessment is now supported by case law from across various jurisdictions that has recognised the refugee status of trafficked persons and persons at risk of being trafficked. Commentators have also argued, with Juss and Kneebone being among the foremost examples, that the refugee status of trafficked persons is now axiomatic and that indeed trafficked persons are exactly what refugee law should be there to protect. An assessment of case law and literature clearly identifies that the process is not as easy or smooth as this conclusion might suggest. On the contrary, the road to international protection for trafficked persons and persons at risk of trafficking or trafficking-related harms is bumpy at best, both substantively and procedurally. Whilst these challenges must be acknowledged (and addressed) refugee protection remains a viable and effective channel for protecting trafficked persons.

As a final thought, recognition of refugee status or other forms of international protection alone is not enough. The integration and rehabilitation of trafficked persons requires specific attention to adequately address the trauma and harm experienced during, and as a result of, the trafficking experience whilst also overcoming vulnerabilities to further harm. The integration processes of trafficked persons are affected by a variety of factors including trauma and lack of skills, their

heterogeneity in family situations, social environment and economic situation. Long term protection and integration for trafficked persons needs necessarily to include safety, education, healthcare, psychosocial support and employment. At present, there is little awareness about the medium and long-term integration outcomes of trafficked persons yet their protection and long term integration remains vital. Recognition of protection needs is only the first step in ensuring that the human rights of trafficked persons are safeguarded, that their human dignity is restored and respected, and that they are given the opportunity to re-establish their own conceptions of dignity and self worth.

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